Proceedings of The Samuel Griffith Society

Inaugural Conference

Hillton-on-the-Park, Melbourne; 24 - 26 July 1992

Table of Contents

Foreword

John Stone

In the letter originally inviting people to become members of The Samuel Griffith Society and indicating the intention of its Board to convene an Inaugural Conference in Melbourne on 24-26 July, 1992 (see Appendix II), some particular reasons for this initiative were noted.

First, there now seems to be afoot a campaign to have the view accepted that our Constitution is "badly in need of reform". No very compelling evidence for this view is generally advanced, other than the intellectually shoddy one that we are nearing the year 2000. As to that, readers should see the delectable comments in the paper herein by S.E.K. Hulme, QC.

Secondly, and despite the earnest disclaimers of most of the principal actors, there appears little doubt that this campaign is coming from the same centralist quarter which, having been defeated in the debates of the 1890's, has worked throughout this Century to undo the original Federal compact, and whose efforts in that regard have been redoubled over the past twenty years.

The chief purpose of The Samuel Griffith Society is, therefore, to ensure that, if any changes are to be made in our Constitution, they should only occur after the widest range of thought and opinion has been canvassed. In that process it will be the particular role of the Society to question and, as necessary, oppose the further expansion of the power of Canberra. Already in Australia that expansion has gone very far, to the point where it threatens a serious breakdown of trust in government as a whole.

One of the most serious aspects of this steady distortion of the original Federal compact is the process by which it has chiefly come about.

Not the least of the duties of The Samuel Griffith Society will therefore be to examine this process.

In particular, the role in it of a now centralist and expansionist High Court needs to be placed firmly under the microscope of public opinion. Some of the papers in these Proceedings begin that task; but there is much still to do.

The Inaugural Conference of the Society, whose proceedings are now recorded in what follows, comprised three major addresses and ten papers delivered on a series of themes. Inevitably, not all the relevant issues could even be touched upon; and even those which were, will certainly repay re- visiting.

I do nevertheless express the view that these papers are of such a generally high order, and without exception generated such enthusiasm among those who heard them last July, that they will come to be seen as having had a seminal effect upon the debate which now lies before us.

It is to that objective that this volume is dedicated.

Launching Address

Re-Writing the Constitution

Sir Harry Gibbs, GCMG, AC, KBE

When, in the last decade of the nineteenth century, representatives of the Australian colonies, among the most notable of whom was Sir Samuel Griffith, met for the purpose of considering a scheme for a Federal Constitution, they were actuated by what appeared to them to be practical needs and inspired by an ideal.

The principal needs which they saw were to provide a common framework for defence and to establish what would now be called a common market for the purposes of trade.

The ideal was that the Australian continent should be occupied by only one nation.

When, today, it is suggested that Australia should have a new Constitution to mark the commencement of the new century, it is difficult to discern any practical need or any ideal which would provide a sufficient motive for entirely abandoning a Constitution which has proved in practice to be extremely flexible, and for re- moulding our constitutional principles in a way not yet made clear.

The argument that the Constitution was defective because it was drawn in horse and buggy days was used unsuccessfully by Dr Evatt more than forty years ago, and the fact that the Constitution is approaching its centenary at the same time as the twentieth century is drawing near its close provides in itself no reason why the Constitution should be rewritten.

The Constitution of the United States, on which ours was modelled, was framed in 1787 and in that country no politician would dare to suggest that its Constitution should be consigned to the scrap heap.

Of course, no legal instrument is likely to be perfect and it is possible to suggest changes that might beneficially be made to our Constitution, although it is by no means easy to make proposals for substantial change which would meet with general agreement.

However, when it is suggested that we should adopt a new Constitution, that implies that it is thought that the Constitution needs not mere amendment, but radical change. It may therefore be instructive to examine what are the essential features of our Constitution, since it seems natural to assume that the protagonists of a new Constitution wish to do away with, or at least to modify, some of those features.

The essential characteristics of our Constitution seem to me to be these.

There is a federal union under the Crown, that is, federalism is of the essence of the Constitution, and it is intended that Australia should be a Constitutional Monarchy.

The Parliament is comprised of a bicameral legislature, democratically elected. It is implicit that there should be a system of responsible government - the ministry should be members of, and responsible to, the legislature, and there is no rigid separation of legislative and executive powers.

The independence of the judiciary is intended to be secured. There is no general bill of rights.

The Commonwealth created with these attributes is intended, as the Constitution Act declares, to be "indissoluble"; and the Constitution itself is made difficult to amend.

It is not difficult to guess which of these features will be sought to be altered if a new Constitution is to be enacted;
indeed, in some instances guesswork is unnecessary, for some of the eminent persons who say that we need a new Constitution have made their wishes clear.
Let me mention first one question that will be among the most contentious of the proposals for change, and in my opinion the most potentially dangerous, threatening as it does the very basis of the ideal of one nation for one continent. That is the proposal that the Constitution should provide for a treaty, or some other form of reconciliation, with the Aboriginal people and the people of the Torres Strait Islands, and should recognise them as the indigenous peoples of Australia (which of course they are) and should secure for them special constitutional rights.
We may admit that in the past the Aboriginal people have been the victims of crimes and blunders and that the condition of many of them (but by no means all) is today lamentable. We should certainly recognise that the situation of many of the Aboriginal people means that they have special needs which our society should meet.
It does not follow that a generation which was in no way responsible for the crimes or the blunders of the past should be so racked with guilt that we should imperil our sovereignty and place the very existence of our nation at risk.
We cannot ignore the fact that already the argument is put forward that the Aboriginal people are a sovereign people who should receive international recognition as such. It has been frankly suggested that it is possible that in the future some areas of Australia, such as Arnhem Land, the Central Desert or the Torres Strait Islands, may become separate nations.
Whether or not it is safe for Canada to create a separate nation in its remote north, it must be obvious that the security of Australia would be threatened if any of those parts of Australia, which are nearest to neighbouring countries, or at the very heart of the continent, acquired separate nationhood.
As I shall mention briefly later, constitutional provisions which purport to create rights in broad terms can be interpreted to give a result consistent with the preconceptions of the interpreter, and there can be no doubt that those who seek recognition of the sovereignty or independence of the Aboriginal people would find support for their arguments in constitutional provisions of the kind proposed.
There is at present ample legislative power to make proper provision for the amelioration of the lot of the Aboriginal people, and neither justice nor humanity requires that the existence of the Australian nation should be endangered by including in the Constitution provisions that recognise that the Aboriginal people have a status different from that of other Australian citizens and that they have special rights based not on individual needs but on race.
Another constitutional change, of quite a different kind, is clearly intended by many of the advocates for a new Constitution, that is, that Australia should become a republic. There are some who regard this change as inevitable and under-rate its importance.
Putting aside the question of loyalty to the Queen, it is not true to say that all that would be involved would be the substitution of a President for the Governor-General.
One question that would arise is whether a President would still be able to exercise the reserve powers of the Crown and if so, whether he or she, being politically appointed, would do so free from political influence or bias.
And if the President retained those powers in relation to the Commonwealth Parliament, who would exercise them in relation to the States?
The existence of the reserve powers has been anathema to some since Sir John Kerr exercised them in 1975, but they remain necessary in any system of responsible government if the ultimate authority of Parliament over the executive is to be maintained.

It should not be forgotten that during the last five years the Governors of two States (Tasmania and Queensland) have had occasion to exercise those powers, and have done so in a way which everyone recognised was completely impartial.

If the powers were abolished in relation to the States, responsible government would be diminished; if a President could exercise them in relation to the States, that would further weaken federalism in Australia.

The manner in which powers were divided between the Commonwealth and States would be critical in any new Constitution. At the outset of the Convention held in 1891, Sir Henry Parkes indicated the approach to federalism which was intended to be taken in the Constitution. He said:

"I think it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as is absolutely necessary in view of the great end to be accomplished, which, in point of fact, will not be material as diminishing the powers and privileges and rights of the existing colonies."

Constitutional developments, commencing in the 1920's, have so expanded Commonwealth power that its exercise has crippled the powers, invaded the rights and diminished the authority of the States.

If there is to be constitutional change, a significant issue will be whether the power of the Commonwealth is to be further expanded or is to be confined to areas that really do require action by the central government.

My view of the appropriate division of power in a federal system can be summed up in one sentence: nothing should be done by the Commonwealth that could be done equally well by the individual States themselves.

That, I think, was the view held by the majority of the founding fathers of our Constitution and it is a principle for which the European Community is currently aiming to gain acceptance; with the bureaucratic genius for meaningless jargon they call it the principle of subsidiarity. It is not a view widely held in Canberra.

Already, in Australia today there is no ascertainable line of division between the powers of the Commonwealth and those of the States - potentially the Commonwealth can invade any field of governmental activity, and has invaded many, with a cumbrous and expensive duplication of bureaucracies.

It is almost certain that the new Constitution which those who initiated the movement for change would like to see in place would make it easier, rather than more difficult, for the Commonwealth to diminish the authority of the States. Who can doubt, for instance, that it will be said that the Commonwealth should have power with respect to the environment and the economy? A new Constitution may still be a federal one, but if the reformers have their way it may provide for federalism of a kind in which the powers of the States are even more attenuated than they are at present.

It has been made clear by those who wish to rewrite the Constitution that they would strongly support another change -the inclusion of a guarantee of basic rights. Bills of rights are in fashion at the moment.

The Australian Constitution does give constitutional protection to the democratic institutions of the Commonwealth, but otherwise contains only a rudimentary guarantee of rights. Nevertheless, although the legislative and administrative acts of the Commonwealth and the States would not always pass the tests that would be applied under a bill of rights, the people of Australia enjoy as much freedom as exists in any country whose constitution contains an elaborate guarantee of rights.

At first sight it might appear that a bill of rights could do nothing but good, securing liberty and justice. A little thought will show that it would have disadvantages as well as advantages.
Perhaps the greatest disadvantage is that no human mind can foresee the effect which a court may ultimately give to general words intended to guarantee a right. Who, in 1901, could have predicted the course of interpretation of section 92?
The result may be that beneficial legislation may, quite unpredictably, be struck down by the courts and ordinary commercial or personal activities, as well as governmental policies may be frustrated. The history of the Fifth and Fourteenth Amendments to the United States Constitution shows that very clearly.
Those amendments, which provide that no one shall be deprived of life, liberty or property without due process of law, have been given an effect which varied in accordance with the views on politics and society of the judges at the time; in 1857 they meant that the Congress could not limit the expansion of slavery, in 1923 they meant that laws guaranteeing minimum wages for women and children were invalid, and today they enable the Supreme Court to decree at what stage of pregnancy, if at all, a woman may have an abortion.
Since, under a bill of rights the courts are often required to decide questions of a political nature they in consequence tend to become politicised, as again United States experience shows.
The enforcement of a bill of rights often means that criminal proceedings fail for purely technical reasons: witness the release of Trimbole by the Irish courts.
Judges, in giving effect to a bill of rights, are sometimes required to engage in detailed regulation of a bureaucratic kind. I once met a federal judge in California who did nothing but hear claims from the inmates of San Quentin Prison, which is a State Prison, that the food was so unpalatable, the beds so uncomfortable and the bath water so tepid that imprisonment there contravened the constitutional ban on cruel and unusual punishments.
Since every right entails a corresponding obligation, a bill of rights may obviously place additional burdens on the community or on some sections of it. If there were to be a bill of rights there would be conflicting opinions as to what are the basic rights that should be guaranteed. I would expect, for example, that there would be a move to delete the word "property" from the familiar guarantee of life, liberty and property. In truth, an actual division of power, such as exists under a federal system, affords a more effective protection of human rights than mere words can do.
If the Constitution were to be rewritten, it might be expected that some of the other essential characteristics which it now possesses and to which I have already referred would be preserved by general agreement. No one would be likely to suggest that the Parliament should not be democratically elected or that the judiciary should not be independent. The practical difficulty of achieving a unicameral legislature would be likely to deter those who would wish to abolish the Senate from trying to do so, although an attempt might be made to limit the Senate's powers.
On the other hand, it is probable that an attempt would be made to render the Constitution easier to amend, in the hope that gains that could not be won today might be won tomorrow.
It might be suggested that the principles of responsible government should be modified, to enable the appointment of Ministers who were not Members of Parliament.
Opinions might understandably differ as to the value of amendments of those kinds.
There are some suggestions for improvements to the Constitution which might be generally supported. There might be no dissent from the suggestion that the independence of the judges of the States, as well as of those of the Commonwealth, should be protected, and that the rights to trial by jury for serious crimes should be clearly guaranteed.
On occasion in the past, amendments that have been thought to have popular appeal have been proposed as the sprat to catch the mackerel of accompanying amendments of a more

controversial kind, but the tactic has hitherto proved unsuccessful. The possibility of making marginal improvements does not justify rewriting the whole Constitution.
However, on issues of fundamental importance it is inevitable that there will be irreconcilable conflict. Take for example, the crucial issue of federalism.
On the one side there will undoubtedly be an attempt to expand Commonwealth power at the expense of the States. On the other hand there are those who, like myself, would say, with due acknowledgment to the words of a celebrated resolution passed in the eighteenth century by the House of Commons, that the power of the Commonwealth Government has increased, is increasing and ought to be diminished.
The amendments that I would favour would be intended to make federalism work as was originally intended. To achieve that result, it would first be necessary to redefine some of the legislative powers of the Commonwealth, principally with a view to ensuring that they are specific in nature, and cannot be given so wide an effect that they spill over into almost every field of activity in which the States engage.
This does not mean that one would necessarily oppose the conferral of further powers on the Commonwealth, if it appeared that there were particular matters with which the States were not competent to deal. What is meant is that the powers of the Commonwealth should be defined with such precision that they cannot be given so all-embracing a scope that they distort the balance between the Commonwealth and the States that was originally intended by the framers of the Constitution.
Particular attention would need to be paid to the external affairs power, the corporations power and the power with regard to overseas and inter-State trade.
Everyone agrees that the power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any State is quite unsatisfactory, but there will be widely differing views as to what should replace it.
To improve the working of the federal system it would also be necessary to amend the constitutional provisions concerned with the financial arrangements between the Commonwealth and the States.
The Commonwealth now dominates the States in financial matters, raising much larger revenues than it needs to for its own purposes and distributing the balance to the States on terms that control their activities. This fiscal imbalance not only impairs the ability of the States to govern their own affairs; it also often reduces their sense of financial responsibility.
Part of the problem is created by the fact that the States are forbidden by the Constitution to impose duties of excise - a term which has been given a wide meaning - and by the provision of the Constitution, originally intended to be of an interim nature, that enables the Parliament to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.
However, the question is a complex one. Many of the difficulties could be resolved by agreement between the Commonwealth and the States, but having regard to the strong centralist leaning of most Commonwealth Governments, one should not be too optimistic that any completely satisfactory agreement will be reached.
Although the Constitution would benefit from amendment in some respects, it is not an outdated instrument that requires radical change, in spite of the vast changes in society that have taken place since 1901.
It is difficult to escape the belief that the move to rewrite the Constitution is quite adventitious, and unlikely to be productive.
However, our response cannot be one of mere inertia. It has been proposed that for the rest of the century there should be a process of public education and debate in Australia for the purpose of

reviewing the Constitution. The Samuel Griffith Society must ensure that education does not degenerate into propaganda, and that the debate is not one-sided.

The Society is launched in the hope that it will take an active part in the discussion of these questions, so that no change is made to the Constitution unless it is clearly seen to be for the good of the people of Australia.

Inaugural Address

Right According to Law

The Hon Peter Connolly, CBE, QC

From the beginning of the Federation until 1 May 1988 s. 92 of the Constitution had been regarded as conferring a personal right on the people of Australia to conduct interstate trade free of governmental control except such control as might fairly be regarded as regulatory. The provision had played a central role in denying to the Commonwealth the right to nationalise the banking system of the country and it had prevented, to a large extent, the bringing into existence of centralised marketing schemes, whether by the State, or the Commonwealth or by the combined efforts of both. The law on the subject had become well settled although its philosophical underpinning was the subject of some divergence of opinion on the court. There was very little uncertainty about it for as Professor P.H Lane pointed out (62 A.L.J. 604 at p. 605) virtually no situation which could arise under s. 92 posed a problem for which there was not a binding precedent.

This was the state of the law when each of the present Justices, except McHugh J. who was appointed after the date I have mentioned and also Wilson J. who was still then on the court, took office as justices. On 2 May 1988 this state of the law was radically reversed. The notion that the citizen had a personal individual right of freedom in interstate trade was overruled, although it had been recognised as such by Griffith C.J. in New South Wales v. The Commonwealth (1915) 20 C.L.R. 54, by Barton J. in Duncan v. Queensland (1916) 22 C.L.R. at p. 587 and even by Isaacs J. the architect of the Engineers' Case which permanently distorted the Constitution – see James v. South Australia (1927) 40 C.L.R. at p. 32.

The court paid no regard whatever to the views of their predecessors. The view which they have preferred is essentially that of Evatt J. in The King v. Vizzard (1933) 50 C.L.R. 30 at p. 82 which had never been accepted. Indeed two years later Dixon J., Australia's greatest judge, was to say in O. Gilpin Ltd. v. Commissioner for Road Transport (1935) 52 C.L.R. 189 at p. 211 - "It is not easy to appreciate the meaning of a guarantee of freedom of trade and intercourse unless it gives protection to the individual against interference in his commercial relations and movements". The vast body of law which grew up around s. 92 was based on this essential premise.

The court made no attempt to deal with the judgments of their predecessors all of which they were about to overrule and the Solicitor-General of the Commonwealth was discouraged from dealing with the previous case law. The simple fact is that the decision in question Cole v. Whitfield (1988) 165 C.L.R. 360 was one in which the Attorneys-General of the Commonwealth and all the States combined to present more or less the same argument and the result of which was to strip from the people of Australia a constitutionally entrenched right which they had enjoyed before any of the present Justices was born, to remove to a great extent restrictions on the powers of the States and virtually to free the Commonwealth altogether of any constraint arising out of s. 92. When one adds the further fact that the case in hand, Cole v. Whitfield, was a simple case of legislation passed for the conservation of the crayfish fisheries of Tasmania for the future use of man and that there was ample precedent for the validity of such legislation, the decision can only be seen as a deliberate intervention by the court for the benefit of the

governments of Australia at the expense of the governed. Yet such is the lethargy of the Australian people that there has been little criticism of the decision even in academic circles.

This brings me to what you may well have thought to be the somewhat obscure title of my paper "Right According to Law". The phrase derives from the oath taken by justices of the High Court whereby the newly appointed justice swears to "do right to all manner of people according to law." We boast that we live under the rule of law. The Parliaments and executive governments accept the decisions of the court where the Constitution or the general law is seen to impose a restraint upon their respective powers, but it is not merely the people, the Parliaments and the governments who are subject to the law, but the courts themselves.

What occurred in Cole v. Whitfield was in truth extraordinary. The question goes far beyond whether nationalisation of an industry or centralised marketing are desirable or not. The question which was starkly posed was whether the citizens of an allegedly democratic society will tolerate the abrogation of their rights in so cavalier a fashion. It cannot be doubted that if it had been put to the people by referendum that s.92 should be repealed or even amended so as to substitute the formula which the court has invented, the referendum would have been soundly defeated and that probably in New South Wales and Victoria as well as the rest of the country. Yet the answer to the question I have posed would, for Australia at least, appear to be that the people will indeed tolerate such behaviour from their highest court.

What has all of this to do with The Samuel Griffith Society? Well, as all present here are well aware, Griffith was not only one of the political architects of federation, but he played perhaps the most significant part in the drafting of the Constitution. When the High Court was constituted in 1903 Barton, the first Prime Minister, who could well have taken the Chief Justiceship, showed both generosity and good judgment in conceding the prior claim of Griffith. From then on until 1920 the first High Court played a vital role in insisting on the essentially federal nature of the Constitution and applied the American precedents which insisted that the governments of the Union on the one hand and the States on the other must not by their legislation impose burdens upon each other. There are those who describe this period as reflecting the dream of Sir Samuel Griffith. This expression is a masterpiece of faint praise. It suggests, of course, that the first court had their heads in the clouds. Nothing could be further from the truth. They were all of them experienced in the world of affairs. The people had adopted a Constitution modelled on that of the United States and the court naturally applied the constitutional doctrine which had evolved in that country to ensure the maintenance of the federal balance. What occurred was that lawyers, and in particular one Melbourne lawyer Mr Justice Isaacs, perceived that strict legalism which involved treating the Constitution of the country as if it was no more than a Hides and Skins Act, could be used to enlarge the legal authority of the Commonwealth at the ultimate expense of the States. Part of the legalistic approach to the construction of the Constitution was the rejection of the convention debates as an aid to the interpretation of that instrument. Indeed it became "the settled doctrine of the Court that they are not available in the construction of the Constitution": Attorney General (Vict.); ex rel Black v. The Commonwealth (1981) 146 C.L.R. 559 at p. 557 per Barwick C.J. Yet it was an examination of the convention debates in Cole v. Whitfield which identified for the court the formula which they adopted in place of the text of s.92, namely that it is to be confined to legislation which discriminates against interstate trade for the purpose of protecting the domestic trade of a state. So much for settled doctrine when it gets in the way of the interventionist approach!

We are told from time to time that we must abandon the monarchical form of our Constitution so that we may develop a proper sense of self-confidence. It is difficult for the dispassionate observer to see any lack of confidence in Australia's judges. On the contrary, we seem to be blessed with judges who have no false modesty. It is sufficient I think to refer to the recent

decision of the High Court in Mabo v. Queensland, the judgment in which was handed down on 3 June last. The case concerned the possibility that some form of native title to Australian land had existed and had persisted after white settlement in 1788. The settled law on the subject was as stated by Stephen C.J. in Attorney-General v. Brown (1848) 1 Legge 312 at p.316 where it was stated to be

"that the wastelands of this Colony are, and ever have been, from the time of its first settlement in 1788, in the Crown: that they are, and ever have been, from that date (in point of legal intendment), without office found, in the Sovereign's possession; and that, as henceforth her property, have been and may now be effectually granted to subjects of the Crown."

That statement of principle has never been doubted in Australia until 3 June 1992. It was affirmed by Isaacs J. in 1913 in William's case, in 1924 by Lord Dunedin delivering the opinion of the Privy Council in an Indian appeal, by Windeyer J. in 1959 in Randwick Corporation, v. Rutledge, by Barwick C.J. with the concurrence of McTiernan, Menzies and Stephen JJ. in 1973 in Papua New Guinea v. Daera Guba 130 C.L.R. at p.397, by Stephen J. again and by Gibbs J. in 1975 in the Seas and Submerged Lands case and by Dawson J. in 1988 in Mabo v. Queensland, his Honour repeating his opinion in the recent Mabo case. This is the principle on which the lands of the several colonies were administered, Parliamentary approval for the granting of what were called the waste lands of the Crown resulting in grants of freehold and lesser titles over the ensuing two centuries. Now, at last, a good 200 years too late, it has been revealed that this proposition confounds the notion of sovereignty with title to the land. See per Brennan J., Mason C.J. and McHugh J. concurring. No doubt this has sent a shiver through Whitehall. How galling for the British who acquired an empire upon which the sun never set to learn that their lawyers never really understood the principle upon which title to land was to be determined.

We are told, to our astonishment, that in 1788 there was indeed a legal system according to which tribes or other groups of Aboriginal natives moved across the continent taking game and the fruits of the land and that their descendants have thus acquired a "usufructuary title". However, pleasant though this thought may be, it is unlikely that they will derive any material advantage from it. For the court has said that that title is extinguished by inconsistent grants by the Crown or laws of the Parliament. It is suggested in the judgment of Brennan J. that national parks may still be subject to this usufructuary title. How curious! At least in Queensland, national parks are areas in which no-one is permitted to take native flora or fauna and this, at least insofar as Queensland is concerned, would seem to be wholly inconsistent with the notion of bands of usufructuaries moving through the national parks and despoiling them of their protected flora and fauna. Be that as it may, the judgment is likely to engender great expectations and the ultimate result may be cruel disappointment and resentment. An even more revolutionary idea was advanced by Deane, Toohey and Gaudron JJ. that extinguishment of title by Crown grant (an act of sovereignty) gave a claim to compensation. Oh brave new world! I will venture to remind you that I got on to this topic by way of the supposed lack of self-confidence exhibited by Australians while their potentiality for original thought and confident action is stifled by living under a monarchy.

Pleasantries aside, the point which is valid for present purposes is that the distortion of the Constitution from one in which the Commonwealth was to play an important but at the same time minor role, returning its surplus revenues to the States, to one in which the Commonwealth's fingers meddle in every pie has all occurred under the benign eyes of the High Court of Australia. As that court is no longer subject to appeal to the Privy Council, it is becoming apparent that no expedient is too bizarre if the end be thought to justify it. What rational suggestion can be made to bring home to the justices of the High Court that, whatever may be said of their decisions in general, their deliberate social engineering does not command

universal admiration or indeed respect? It is high time that Australians started to speak out on matters of social and constitutional importance.

Against this background it may be useful to remind ourselves that the legislation which established the hegemony of Canberra has its upside if only it is observed. Sir Owen Dixon, on the occasion of his swearing- in as Chief Justice of Australia on 21 April 1952, said that it was the general belief that close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. He went on:

"It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safeguard to judicial decisions in great conflicts than a strict and complete legalism."

Would that the same could be said today! He concluded by saying:

"There is, I believe, a general respect for the Queen's Courts of Justice which administer justice according to law, and I believe there is a trust in them. But it is because they administer justice according to law."

Introductory Remarks

John Stone

Ladies and Gentlemen, Welcome!
Those of you who were here last night, as most of you were, will know that we made a splendid beginning to our Inaugural Conference, with a magnificent address from Sir Harry Gibbs to launch the Society, and a most stimulating – as well as highly entertaining – Inaugural Address from the Honourable Peter Connolly.
But that is just the beginning.
It would of course be invidious to say that "the best is yet to come".
But I do promise you that what is yet to come will be in no way overshadowed by what we have already enjoyed.
At the outset, let me say something , very briefly, about the origins of the Society – if only because, last night, many people have asked me about that.
It is a long story, and I won't bore you with the details of those origins; but I will make two comments about their nature.
Many years ago my late father warned me to stay away from doctors, bankers and lawyers.
Now despite that injunction, I have always personally had a great respect for "the law" - and initially, for lawyers.
Gradually, however, over the years, it was borne in upon me that there are lawyers and lawyers
people like Sir Harry Gibbs
or Peter Connolly
or S.E.K. Hulme (from whom we shall shortly be hearing)
and, on the other hand, people like (say) the late Lionel Murphy.
And as I began to observe developments like the Rocla Pipes case (involving, if I recall correctly, the corporations power); and the Koowarta case (involving, if I recall correctly, both the Aboriginal affairs power and the external affairs power;) and the Tasmanian Dams case (where the interpretation of the external affairs power came, so to speak, to its first full flowering); it began to be borne in upon even my legally untutored mind that something was going on here which made a MOCKERY of that section of The Constitution which governs the process of constitutional amendment.
Now precisely because I do have a respect for the law, it seemed to me regrettable - and even, in the longer-run, dangerous – that these fellows on the High Court were rapidly eroding my respect for it (and them).
They had, to pick up Peter Connolly's great anecdote last night about Sir Samuel Griffith's encounter with the hard drinking men of Western Queensland, mounted a camel (the Constitution) which did not belong to them – but to US – and were sedately riding off into the West (or for all I know, the East) – where they might want to live, but where neither they, nor more importantly we, live at present.
Now my second point about the nature of the Society's origins is best summed up in the words of a Frenchman writing in the 1830s, long before even those "horse and buggy" days of which the latter- day detractors of our Constitution are so fond of speaking.

Alexis de Tocqueville, in his famous work Democracy in America, has a chapter on "Public Associations" in which he had this to say:
"Americans of all ages, all conditions, and all dispositions, constantly form associations, ...If it be proposed to advance some truth, or to foster some feeling by the encouragement of a great example, they form a society." (Emphasis added).
There is much more, but you see what I mean .....
Ladies and gentlemen, The Samuel Griffith Society is now launched "to advance some truth", and "to foster some feeling" in defence of our Constitution.
Having quoted a great Frenchman, let me conclude by quoting a great Englishman, namely William Shakespeare, whose character Henry V, in his great speech on St. Crispin's Day before the field of Agincourt, had this to say:
"That he which hath no stomach to this fight,
Let him depart; his passport shall be made..... "
And further, to adapt that speech's closing words:
"And gentlemen in (Melbourne) now abed,
Shall think themselves accursed they were not here, "
Today, of course, we should have had to say "gentlepersons", but let that pass.
Today's programme begins, fittingly, with a bracket of two papers under the general theme of "Nine Decades of Achievement", to be presented by Hugh Morgan and S.E.K. Hulme, Q.C. respectively; and it is therefore now my pleasant duty, as well as privilege, to introduce the first of them, Hugh Morgan.

Chapter One

The Australian Constitution: A Living Document

H M Morgan

It is a great privilege to have been asked to take the wicket as opening bat this morning at this historic conference. I should begin by confessing that my last formal contact with constitutional matters was over 30 years ago, when as a young law student I sat at the feet of Professor Zelman Cowen, who taught many cohorts of law students, now middle aged, everything they can recall concerning constitutional law.

Those lectures came back to mind when reading, a few days ago, of Sir Gerard Brennan's remarks at a human rights conference in Canberra. When speaking of a Bill of Rights, Mr Justice Brennan said:

"Our society has become more diverse in its ethnic, cultural, religious and economic composition ... there are more minority groups whose particular interests are liable to be overreached by the exercise of legislative or executive power".

Mr Justice Brennan went on:

"A Bill of Rights could also be attractive to the Government which could transfer the controversy surrounding hard political issues to the courts. There are some issues which, in a pluralist and divided society, are the subject of such controversy that no political party wishes to take the responsibility of solving them. The political process may be paralysed".

He indicated that Australian judges "could cope with – indeed revel in – the change" although he refused to personally endorse a Bill of Rights because the question was "essentially political". Such reluctance seems curious in a Justice who is offering his judicial services for the solution of political issues too difficult for the politicians to handle.

When thinking about these remarks in the context of the lectures of 30 years ago I am reminded of Moliere's satirical play about doctors, whom he detested, and the argument about the location of the heart – was it on the right side or the left side of the body? In sweeping aside protestations that the heart used to be on the left side the triumphant protagonist for the new medicine pronounced

"Oh, we've changed all that".

I should not identify the High Court with but one of its justices, even such an influential one as Mr Justice Brennan. But his remarks do give us a revealing insight into the thinking which we are entitled to assume is now characteristic, if not representative, of High Court opinion.

My theme is, I think, a simple one – specifically that the Constitution, as the founders drafted it, reflected the political and social realities embedded in the minds, habits and customs of the Australian people a century ago – but that in its contemporary form it no longer does so. More than that, there is now today a great gulf between the constitutional thought and practice of political and legal elites, and the political habits and thinking of most Australians.

There is a long story attached to the opening up of this gulf between what we can call chattering class Australia on the one hand and working Australia on the other. Professor Mark Cooray has written of the changes in legal philosophy which have influenced the High Court. As he and others have pointed out, the Engineers Case in 1921 was a watershed. Griffith, Barton and O'Connor had retired. Higgins and Isaacs were still in place, and they had direct recollections of

the convention debates. Higgins had always been a centralist, and as his career in industrial relations showed, had a strong belief in the efficacy of government intervention in the economic life of the nation. The wartime experience had boosted faith in planning, regulation, and government ownership.

Each generation, as it takes over the reins of office in the important institutions of the nation, has to interpret the constitution and its history, in the light of its experience, and with regard to the problems with which it has to contend.

The new post-World War I generation of High Court Justices, taking a lead from the Privy Council, began a process of reducing the effective sovereignty of the States. Some justices adopted a literalist approach, preferring to view the Constitution not as the foundation of Australian federalism, but as a document to be interpreted as if it were just another statute. The consequence of this technique has brought about a situation whereby more and more power and responsibility has been transferred to the Federal Government.

The doctrine of literal interpretation has enjoyed enormous standing within the legal profession for many generations. It has worked in the interpretation of statutes, since if the words of a statute lead to a manifestly absurd result, then the legislature can readily amend the statute. And it is the legislature's particular responsibility to do so. Judges have from time to time, in declining to accept legislative responsibility, pointed out the need for legislative reform arising from the judicial construction of a statute.

Under Sir Owen Dixon the doctrine of legalism held sway. Dixon was strongly opposed to a literal approach to the Constitution. He frequently referred to O'Connor's celebrated dictum to the contrary in the Jumbunna Case. But even Dixon's legalism has been misunderstood. The transfer of taxation powers and resources from the States to the Commonwealth continued.

The Constitution, however, is not just another statute, which can be changed by the legislature if it proves, under judicial interpretation, to yield absurd results. It was a compact which was deliberately designed to be difficult to change. The convention debates make this clear. Specifically, it could be changed only if the Federal Government put a referendum to the people which was supported by a national majority and by a majority of voters in a majority of States. That clause was essential if the colonists in the 1890's, particularly those not from Victoria or NSW, were going to support the Federal compact. That constitutional change would be difficult was of the very essence of the compact.

This fact, combined with High Court capacity to interpret the Constitution against the States, introduced an unanticipated ratchet effect. The most generous observer of the history of the High Court will concede that High Court decisions have resulted in the very substantial transfer of power and resources to the Commonwealth. Because there was no mechanism for the States, or the people acting through their State governments, to reverse the process, the High Court has become a one-way stop valve.

Another aspect of constitutional interpretation which has had perverse consequences has been the attempt in Section 51 to set out precisely what powers the Federal Government was to have. The States were to retain unimpaired sovereignty in every other conceivable sphere of legislative power. On the face of it this seemed a very reasonable thing to do. But if, contrariwise, Section 51 had carefully defined all the powers the States were to have, leaving the Commonwealth the rest, then judicial interpretation may well have had the opposite result to that which we have experienced. It is the familiar, half-empty -half-full wine glass problem again. It is natural to concentrate on the wine, rather than on the empty space above it.

The Canadians defined the powers of the provinces instead of the national government, and provincial governments in Canada are far more important than our State Governments. Canada now seems to be a nation now breaking up into its constitutuent parts, but this process of

dissolution is driven by what I believe will be ultimately futile attempts to contain the Quebecois within the Canadian federation. There is no federal structure which will work if a significant part of the country is determined not to be satisfied.

On the one hand, then, the High Court, for over 70 years (in fact since the retirement of Sir Samuel Griffith), has been engaged in this process of reducing the effective sovereignty of the States. The Australian people, on the other hand, have consistently, at referendums, indicated their preferences for constraining the power of Canberra. Their most recent opportunity was in 1988 and that referendum resulted in a most decisive rejection of an attempt to increase, still further, the power and influence of the Federal Government. I still treasure the comment of the then Attorney General, Lionel Bowen, who complained after the referendum that Australia would have to become a more civilised nation if sensible proposals like his were ever to succeed.

We are now in the position that there is hardly an area of political life remaining in which the Federal Parliament cannot, if it so decides, override a State Parliament. The only effective constraints preventing Federal Government encroachment on traditional State powers, it seems to me, are political constraints. For example, as a consequence of the 1967 Referendum, it is widely assumed that there is no constitutional barrier to the Federal Government enacting Federal Aboriginal Land Rights legislation. In 1984, that particular ambition was very high on the agenda of the Hawke Government. It backed away, at that time, presumably because it feared the political consequences. It may also be true that that Government was unwilling to test the then High Court on the issue.

Today, with a different High Court, and the judgments in the Mabo case before us, no such fears concerning judicial constraints need arise. The consequences of Mabo for State sovereignty are, I believe, very serious indeed, and could arguably develop into a constitutional crisis without precedent in our history. More of Mabo later.

I have referred at some length to the perverse effects of High Court interpretation of the Constitution upon the federal compact. Another design failure, from the point of view of the constitutional draftsmen, has been the Senate. The Senate was to be the States' house and provide a counterbalance to the power and authority of the people's house. However, after federation, it soon became captured by party politics.

Senators go to Canberra as party representatives. Some of them become ministers. All of them are members of one of the best clubs in the land. I am often reminded of a comment attributed to the legendary Labor Senator Pat Kennelly, who said, making full dramatic use of his slight speech impediment,

"When they get to Canberra.... Brother...they change."

The Constitution itself has become therefore, under these conditions, a symbol of what Australia might have been if the compact which our grandfathers and great-grandfathers forged a century ago, had not been construed out of recognition by the High Court on the one hand, and had not fallen to the grim realities of party politics in the Senate on the other.

It is nevertheless a document which still appeals strongly to us, because the realities which guided the constitutional draftsmen, and those who criticised and debated their work, are still realities today, grounded in our political traditions and in human nature. The subversion of that document will, therefore, whilst the Constitution can be read, and whilst the convention debates are available, continue to cause resentment in those who identify with the ideals which moved our founding fathers, and brought the federation into existence

There are two separate matters here. The first is the fact, or otherwise, of judicial reconstruction of the constitutional document. This conference is to be addressed by a number of eminent constitutional lawyers and I am sure they will, in various ways, address this issue of judicial reconstruction, and how it has come about. However, one does not need to be a lawyer to grasp

either the implications of the Dams Case, or the destruction of responsibility in political life which is manifest in the annual charade of the Premiers' Conference.

The second is the very great need of rediscovering a more satisfying, a more effective, and (let me use an economic term) a more competitive structure, within the political order which the constitutional draftsmen sought to describe with the words of the Constitution. The political debates of the 1990's in Australia are all about recovering the prosperity and economic growth and entrepreneurial dynamism which we used to take for granted. Our economic decline is, fundamentally, a symptom of political ill health. The question immediately arises whether or not the constitutional changes that have been wrought, particularly by the High Court underlie, or have contributed to, our contemporary, very serious, economic problems. Are our contemporary constitutional practices economically debilitating?

The Constitution is a document of approximately 12,500 words. It might be helpful to us if we think of it, not as a document, but as a mural. It was a mural painted by a few principal artists, notably Sir Samuel Griffith, but in painting this mural the artists had to jointly solve, if they could, the primary problem of federation. That problem was, and remains, the contradictions arising from a sovereign parliament elected by the Australian people wearing their Australian hats, and the sovereign parliaments elected by the people wearing their Victorian, Tasmanian, South Australian and other State hats, and what happens when those sovereignties (the use of that word is deliberate) clash.

In constructing this mural the artists, to continue our metaphor, were obliged to use traditional materials, and these materials, as the convention debates show, were the political habits, modes of behaviour, and ideas of government and political life which the colonists, or their parents, had brought with them from Britain. What is of continuing relevance to us is that they drew heavily on the US Constitution, and the ideas embedded in it, in order to construct this vision of a new nation. Those American ideas, in their turn, had come from Britain in the C18, and the contrast and conflicts between the political habits, ideas, and conventions in Britain of the C18, and one hundred years later, has caused many difficulties for us.

The purpose of the mural was to set in plaster and paint, as it were, a vision of an Australia which would command allegiance from the citizens of the six colonies. In order to command that allegiance the citizens had to be assured that although a new nation was to be born, the political life of the six colonies would continue, in large measure, as it had developed since self-government. The problem was the reconciliation of dual sovereignties.

The fundamental political fact, in the 1890's, was that federation was only possible if dual sovereignty was to be retained; that citizenship of both colony, or State as each colony was to become, was to survive, and flourish, along with citizenship of the new Commonwealth. This issue was a focal point of the debates of the 1890's.

The idea of sovereignty was a very important part of the political tradition which the colonists brought with them from Britain. Sovereignty, coupled with responsible government, was, for them, the unconstrained power of Parliament not only to legislate, but also to appoint the Executive, the Queen's Council, from among its ranks. Parliament was constrained in its power only by periodic election by the people. The theory was, of course, that through election, Parliament expressed the `Will of the People', and that that `Will' should not be constrained.

Unlike the United States, where legislature and executive were constitutionally separated, in Australia executive and legislature were joined together through the actions of the majority in the Parliament. This was an example of attempted reconciliation of differing C18 and C19 British ideas of political arrangements.

That understanding of sovereignty, and its conjunction with responsible government, was fundamentally incompatible with federalism. J W Hackett, of Western Australia, summarised the dilemma in 1891 in these words:

"Either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government."

The dilemma was reconciled in the mural which the founders painted by allocating specific responsibilities to the new federal parliament, responsibilities defined in Section 51. Apart from those Commonwealth responsibilities the States were to retain their former sovereignty. The guardianship of the continuing vitality of the States was to be the Senate, modelled, of course, on the US Senate, and clashes between the Senate and the House of Representatives were to be resolved through a double dissolution and a joint sitting of both Houses.

This was, and remains, a very cumbersome mechanism. The constitutional draftsmen did not expect it to be used often. Brian Galligan, in one of his perceptive essays, refers us to Edmund Barton, who at the 1891 Convention said that:

"Any constitution such as the Australian that laboured under the misfortune of being partly written, would not work without the lubricating influences of restraint and discretion. However we may err in allotting too much power or too little power to this or that body, we still have the good sense of an English- born race to carry us through".

There has been only one double dissolution election and joint sitting, that of 1974, which passed six Bills. One of them in particular, the Act allowing for the election of two senators each from the ACT and the NT, was subsequently declared constitutional by the High Court in a 4-3 majority, Chief Justice Barwick and Justices Gibbs and Stephen dissenting. That decision is one which, to a run away lawyer like me, exemplifies the process of painting over, completely, the original constitutional mural, and imposing a completely new design on the plaster.

The High Court, together with other federal courts, is prescribed in Sections 71 to 80 of the Constitution. The question of just how much power the High Court was to wield was not often discussed during the convention debates. We take for granted the assumption that the High Court can construe the Constitution in such a way, as in the Dams Case, as to turn its plain meaning upside down. And although we do not like what the High Court is doing we are extremely reluctant to criticise the Court.

That reluctance is well founded. The civil courts are institutions which still retain respect and authority. They play a major part in sustaining the fabric of business and social life. The Rule of Law still holds in Australia and it is the duty of the courts to uphold that Rule. Judges today occupy a place in our society once reserved for bishops. One of the expressed aims of The Samuel Griffith Society is to uphold the independence of the judiciary. The High Court is at the pinnacle of our judicial structure and its reputation and authority either illuminate, or cast a shadow, over that structure. The High Court has boasted some very great jurists, notably Sir Owen Dixon, and their fame still buttresses the High Court and gives it a standing and a prestige which other courts must envy. No other institution in our constitutional framework has enjoyed the near universal respect, and freedom from criticism, that the High Court has enjoyed. Only the communists maintained a critique of the so-called capitalists' court, deciding in favour of the bourgeoisie, giving legal articulation to the class interests of the rulers.

As we look back over the past seventy years I believe it is now impossible to avoid the conclusion that the High Court has acted in such a way as to set aside the fundamental purpose of the federal compact set down in the Constitution. Whether it has done so from a laudable desire to behave in a totally apolitical manner, or from innate centralist tendencies, is ultimately irrelevant.

Somebody has to adjudicate disputes between the Commonwealth and the States. The Constitution, to go back to my metaphor of a mural, has to be interpreted by some body of recognised art critics who can authoritatively say "that is what the mural means in this context", and have that interpretation accepted not just by art enthusiasts and connoisseurs, but by the people as a whole.

I have said before that the Constitutional draftsmen were seeking to solve very real political problems; problems arising fundamentally from the ideas of sovereignty which were current one hundred years ago, and which reflected the substantially unconstrained powers of the colonial legislatures.

We have to remind ourselves that the politics of colonial Australia, a century ago, were predominantly the politics of small cities; not unlike the Greek city states where our political traditions were established two and a half millennia ago. The very word "democracy" is of Greek origin, and democracy as we now understand it, found its earliest full expression in colonial Australia.

The number of people working in agriculture and mining in C19 Australia, and thus cut off from the social and cultural life of the cities, was proportionally much greater than today. Nevertheless, the work of drawing up political agendas and the formulation of political issues to take to the people; the writing for the papers and magazines which had such great influence in those days; all took place in Sydney, Melbourne, Brisbane, Adelaide, Hobart, and Perth, but particularly in Melbourne and Sydney. Our word "politics" comes from the Greek "polis", or city. The life of politics is, in the end, the life of the city.

It is a commonplace observation today that the really successful economies of our time are not the great nations such as the US, let alone that once-upon-a-time nation of the future, the late, unlamented USSR. It is the small city states, notably Hong Kong and Singapore which have achieved the most spectacular economic results. The reason for this success is the same reason which compelled our constitutional fathers to seek to constrain the power and responsibilities of the Federal Government.

It is a very easy thing when legislators can pass laws, and ministers can execute policies, but at the same time spend their lives far away, perhaps thousands of miles, from the consequences of their actions. Contrariwise, when those who govern, and those who are governed, live cheek by jowl, as in Singapore, the consequences of political mistakes, particularly in economic policy, cannot long be hidden from view.

There have been many city states throughout history where tyrants, being able to rule through terror, have been indifferent to the economic consequences of their actions. But that is not part of our problem. Our problem, particularly within the last twenty five years, is that of a Federal Government which believes it knows what is best, in very great detail, for everybody. And unfortunately the Federal Government now has the power, substantially because of constitutional interpretations by the High Court, to act on that belief, and it has proceeded, therefore, to complicate our lives beyond the wildest imaginings of the constitutional draftsmen of a century ago.

The Australian people have, many times, indicated their strong attachment to the same constitutional vision as the founding fathers. Despite all the shortcomings of our State politicians we seem to see them as family, and even if they are in jail, or about to go to jail, still family for all that. The original mural of the 1890's is preferred to the repainted version of the 1990's. This preference is not based at all on economic grounds. But my experience in the mining industry convinces me that the enduring attachment to the home State, to one's native city, is not only emotionally satisfying but also economically very beneficial.

When rulers and ruled see each other day by day in the city streets, and provided that the rulers are unable to blame Canberra for the problems of the city, those problems will get attention. To use the economic jargon, the transaction costs of political life, in that situation, tend to be low.

The great competitive advantage which our Constitution could have, indeed should have, provided to us was the advantage of competitive sovereignty. If Australia had become a real federation, in which sovereign States were forced to compete in offering Australian citizens the benefits of wise government, then the reality of competition would have yielded to this country very great benefits.

If, contrariwise, the States are not able to compete, because all the important decisions are taken in Canberra, then competition between the States becomes trivial. It becomes the completely phoney competition of the Premiers' Conferences. We lose the benefits of the politics of the Greek city of classical times, the politics in which transaction costs are low. We lose the benefits of competition in sovereignty services, to coin what I hope will become a popular term. And in losing those benefits we have, I believe, impoverished ourselves more than we can readily appreciate.

The idea of competitive sovereignty, and its benefits, does seem today to be a contradiction in terms. But competitive sovereignty played a very important part in the economic growth of Europe from the C15 onwards. Europe, unlike China for example, was a subcontinent of competing principalities, many of them quite small. Their competition often took the form of ruinous warfare. But it was the possibility of emigration to a friendlier sovereign that enabled people to take their human capital and seek a better life a few days walk away, or across the Channel in England, under a less rapacious Sovereign. And that was a crucial factor in economic growth in Europe.

Competitive sovereignty lies at the very heart of the Australian constitution. It is the recurring image in the mural painted a century ago. It has, however, been covered over. We need to peel off the overlay of presumptuous paint and restore the mural to its original brightness and form. How do we do it?

I do not think we can escape the necessity of reform of the High Court. That is the institution where the greater part of our present problems have arisen. The High Court comprises a Chief Justice and six Justices. They are appointed by the Governor-General in Council, that is by the Federal Cabinet, and save for the possibility of impeachment, hold office until the age of 70.

Since it is the High Court which must hold the ring as between the States and the Commonwealth, the monopoly which the Commonwealth holds on High Court appointments has become intolerable. Let me suggest a High Court in which each State Cabinet appoints one Justice. Under such an arrangement I would not mind the Commonwealth appointing the Chief Justice. I make this suggestion in order to focus on the present method of appointing justices to the High Court and, I hope, to stimulate debate on the issue.

There is another reason why we should, today, be frightened (I use the word carefully) at what is happening on the High Court. I have referred to the doctrine of interpretation known as "literalism", and its perverse consequences on our constitutional practice and arrangements. None the less the doctrine of literalism did provide constraints. The justices were not free, under this rule, to rewrite the Constitution in their own image. However, on June 3 last, the High court handed down its decision in the Mabo Case. This was the case in which the High Court over-ruled a long line of precedent, of the highest authority, concerning the nature of Crown ownership of land in Australia. The Court decided that native title had never been extinguished in the Murray Islands and declared that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.

Mr Justice Brennan wrote the leading judgment in this case and faced the difficulty of finding strong arguments to justify overturning the most authoritative precedent. Very high standing is granted to precedent in the evolution of the common law. Radical reversals are contrary to its ethos and to its structure. Were it not so the law would be a shambles in which the citizen could never predictably locate himself. No legal advice could ever guide his conduct because the courts, not paying respect to the due weight of precedent, could decide cases in accordance with, say, their political or religious predilections. That was the principle and understanding which, not so long ago, guided our courts in deciding common law cases.

On the other hand the Parliament is in great measure, and of necessity, free from constraint or history. Major policy changes can and do occur as a result of changes in government following elections. Sometimes changes occur because both major parties follow public opinion in tandem. It is the endorsement by the people at election time which confers the ultimate legitimacy on a change in fundamental policy. The High Court, contrariwise, never faces the Australian people at an election.

These two issues are at the very heart of my great concern at the High Court's decision in Mabo. In writing the leading judgment Mr Justice Brennan acknowledged that he is turning his back on precedent. I quote:

"This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher "in the scale of social organisation" than the Australian Aborigines whose claims were utterly disregarded by the existing authorities or the Court can overrule existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not." (pp 27-28)

The majority of the High Court decided to overrule existing authorities. The High Court can ignore precedent, and has done so in the past. But it cannot do so without giving reasons. And because this reasoning will apply across the whole gamut of the law, the arguments given to justify overruling the highest legal authorities are of historic importance. What are they? I quote Justice Brennan again.

"Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people."

There you have it. The combination of international community expectations, and the contemporary values of the Australian people, as perceived by the justices of the High Court, become the basis of fundamental, indeed revolutionary, change to our law.

With this judgment, the lead judgment in the Mabo case, the justices of our High Court have de-robed themselves. The High Court has placed itself at the epicentre of what will become, arguably, the most important political debate of the history of this country since federation; the debate concerning the territorial integrity and the effective sovereignty of Australia as proclaimed in the Commonwealth of Australia Constitution Act of 1900. It could rival the conscription debates of the Great War for bitterness and divisiveness.

Some critics may accuse me of hyperbole. Father Frank Brennan, Jesuit, barrister, adviser to the Catholic bishops on Aboriginal Affairs, and son of Mr Justice Brennan of the High Court, when launching his book "Sharing the Country", on June 11 last, told us (Aust. 13.vi.92) that:

"The Mabo decision changes the law of the land."

"Aboriginals and Torres Strait Islanders may claim more than half of WA and demand payment for land taken by governments."

"Areas over which indigenous Australians had a chance of asserting title included vacant Crown land, national parks, stock routes and public reserves."

"The decision gave indigenous Australians a bargaining chip in negotiations for a treaty with white Australians."

Father Brennan may indeed be wrong in his interpretation of Mabo. But he may be correct, completely or in part. He is very well qualified to make such observations. If so, the debate which I predict must indeed take place.

The High Court cannot, in the end, conduct itself with complete disregard of the opinion of the Australian people concerning what they deem to be right and proper. If there is to be a great debate over the role of the High Court then that is a debate which the people will, if a national consensus emerges, have to win. But in the meantime the meaning of the Constitution, and the role and integrity of the High Court as the interpreter of the Constitution, will be at the centre of the

political stage. However regrettable, even tragic, this may be, it is now unavoidable. It is the inevitable consequence of Mabo.

In eight years time we will be celebrating the constitutional centenary. The Royal assent to the Commonwealth of Australia Constitution Act was given on 9 July 1900. On July 31, 1900 a plebiscite in WA, by a margin of 44,800 (a large proportion of whom were ex-Victorian gold-miners) to 19,691, committed the West to the Federation. I refer to the plebiscite in WA particularly because it is in WA, with the Kimberley Land Claim Case, that the full implications of Mabo will next be tested.

After the success of the federal cause in WA the Royal Proclamation was made on September 17, 1900, and on January 1, 1901, the Commonwealth was born.

As we approach the centenary of these events our capacity to draw on the traditions and political resources we have inherited, if we are to save the federation, and preserve the ideals of the constitutional fathers, will be fully tested.

The Samuel Griffith Society, under the leadership of Sir Harry Gibbs, will provide, I am confident, the opportunity for all Australians to take part in these great debates. The Constitution is part of the birthright of all Australians, not just the eminent, not just the constitutional lawyers, not just political elites. I hope in the next few years more and more Australians will say "We want our Constitution back". "We want to restore it and give it again the meaning and purpose with which the founders sought to imbue it."

I believe we can do this. The opportunity is at hand. Let us grasp it.

Chapter Two

Constitutions and The Constitution

S.E.K. Hulme

Introduction

Much will be said here today and tomorrow about the document known as The Constitution. Much has already been said and written elsewhere as to the need to change that document because the world has changed. The more I have read of what has been written by those who seek change, the more sensible it has seemed to try to put The Constitution in its place within the total structure of Australian constitutional law. Nothing I say will be new to the lawyers present. But it may be useful to others, and even lawyers can benefit from being reminded of the truth from time to time.

Written and Unwritten Constitutions

It is often said that England has an unwritten constitution and Australia a written one. The statement is rather worse than a misleading quarter-truth. It rests on a fundamental confusion between two different things, namely "the constitution" or "the constitutional law" of a country as the system of rules relating to the government of that country, and "the Constitution" as a particular document (or group of documents, but I will not add that each time) containing a statement of some of those rules (usually important ones), which rules are often given special weight by their inclusion in that document. Every organised country has the first.
Not every country has the second.
Both legs of the statement require consideration.

A. That English constitutional law is unwritten.

This is the commentators' way of saying that the greater part of the constitutional law of England is written. It is to be found in documents such as Acts of Parliament; statutory instruments; the Standing Orders of the Houses of Parliament, and other laws and customs of the Parliament; law reports; textbooks of recognised authority; and elsewhere. Magna Carta 1215 continues to be part of the constitutional law of England. So does the Habeas Corpus Act of 1679 (the Latin means roughly "Thou (shalt) have the body (in court)"), empowering a court to require any person who holds another person imprisoned to bring that person before the Court and justify the imprisonment. The right of each person in England to his personal freedom rests ultimately on that Act. In 1772 there was heard before the Court of King's Bench the matter of the negro slave Sommersett, a Jamaican slave brought to England to serve his owner during a visit. The words of the great Lord Mansfield have come down to us in various forms, most famously:
"The air of England is too pure for any slave to breathe. Let the black go free."
That declaration, which I do not regret that I can never speak aloud without a tremor in my voice, was made on the return of a writ of habeas corpus directed to Captain Knowles, on whose ship The Anne and Mary in the River Thames Sommersett lay in irons. The writ commanded Captain Knowles to attend the Court of King's Bench and justify the imprisonment. He did attend, and he failed. After Lord Mansfield spoke, no man who breathed the air of England was any more a

slave. Those who have lived in countries where people disappear in the night will need no convincing of the importance of Habeas Corpus as part of the constitutional law of a country. The Bill of Rights of 1689 and the Act of Settlement of 1701 are part of the constitutional law of England. So are the Parliament Acts of 1911 and 1949, and the Royal Assent Act 1967, limiting the powers of the House of Lords in any conflict with the House of Commons. So is the Statute of Westminster 1931, which did as much as a Parliament unable to bind its successors could do, to ensure that the self-governing Dominions had in law what they had long had in political reality, namely complete charge of their own affairs, free from interference by the Imperial Parliament.

Very much therefore is written. But it is also true that many greatly important things do remain unwritten; certainly are not written in any definitive form. This is true of a host of rules and understandings as to how things work: constitutional conventions. No written law establishes the office of Prime Minister; or establishes the Cabinet; or says that the monarch must give the royal assent to every Bill approved by both Houses of Parliament; or prescribes who shall be called on by the monarch, after an election, to form a government. But there are strong conventions indeed as to these and very many other matters. Their strength may be sufficiently illustrated by noticing that on three separate occasions Queen Victoria recognised that constitutional convention compelled her to call on Mr Gladstone to form a Ministry.

It is important to note that conventions of that kind can and do develop. I have mentioned the convention that the monarch has no choice but to give the royal assent to every Bill approved by both Houses of Parliament. The proposition is not one I would have put in those terms to Queen Elizabeth the First, for good reasons one of which is that in her long day my proposition would have been untrue. Gloriana frequently enough refused the royal assent, and her refusals were accepted, like much else she did, as being well within her royal prerogative. The last monarch to refuse assent was good Queen Anne, who did so several times but with some criticism. Her last hurrah was in 1707, a refusal of assent to a bill for settling the militia in Scotland. After that the right to refuse assent withered and it has undoubtedly died. That quite fundamental change in the constitutional arrangements of England took place without one Act of Parliament saying one word about the matter.

B. That Australia's constitutional law is all written, and is to be found in The Constitution.

This is equally untrue. The Constitution is of course fundamental. You will be aware that the legal origin of the Commonwealth of Australia is to be found in an Imperial Statute, the Commonwealth of Australia Constitution Act 1900 (U.K.). That Act provides in section 3 for the establishment of "a Federal Commonwealth under the name of the Commonwealth of Australia". Section 9 says that "The Constitution of the Commonwealth shall be as follows", and sets out what it calls "The Constitution". (I have already referred to the document in that way, and I do so below. I use the capitalised "Constitution" or "a Constitution" as meaning any formal document of the same type.) Section 5 of The Commonwealth of Australia Act provides that the Act (which includes The Constitution) "shall be binding on the courts, judges and people of every State and of every part of the Commonwealth". Nothing inconsistent with The Constitution can stand.

But Australia has vastly more constitutional law than is set out in The Constitution. The greater part of the constitutional law of England was brought to Australia with the English settlement, and its content continues to apply as part of the constitutional law in force in Australia. Through our legislatures we can of course exclude or alter its components as we will. In some States the legislature has drawn up a list of which United Kingdom statutes shall continue to apply, and has enacted that others shall not. The details do not matter today. Until some action is taken, the inherited constitutional arrangements attach.

Thus Magna Carta is part of the constitutional law of Australia (of New South Wales and Victoria, at any rate, and I suspect all States) though somewhat sadly the most recent attempt to call it in aid finally failed: Jago v The District Court of New South Wales (1989) 168 C.L.R. 23. The Habeas Corpus Act 1679 gives to each person in this room the same protection that it gave black Sommersett in 1772.

Again, a few years ago a Cabinet Minister with views directed the Trade Practices Commission to defer indefinitely dealing with a Trade Practices Act application concerning the Australian Stock Exchanges, preferring that the matter remain in abeyance until legislation he believed would soon be forthcoming took the control of the Stock Exchanges from the Trade Practices Commission to the National Companies and Securities Commission. Protests availed nothing. When all else had failed, application was made to the Federal Court for a writ of mandamus directing the Commission to proceed under the law in fact enacted and in force. One authority only was brought forward: the Bill of Rights 1689 and its fine declaration:

"the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;".

The Minister did not take long to give in. His advisers explained to that surprised functionary that great as he of course was, he no more had power to dispense with the laws that in fact existed than had the Ministers who served Charles II. The Bill of Rights governed him here in Australia just as it governed and continues to govern Ministers in the United Kingdom.

Again, it is obvious that the United Kingdom statute the Statute of Westminster 1931 forms part of Australian constitutional law.

The body of Australian constitutional law that is in writing elsewhere than in The Constitution also includes a large written element deriving from Australia, as e.g. the Australia Act 1986 [supported by the Australia Act 1986 (U.K.)], taking even further the legal separation flowing from the Statute of Westminster; the various State Constitution Acts, themselves recently amended by the Australia Act; other Commonwealth and State statutes and statutory instruments; the law and customs of the Australian Parliaments; law reports; even text books by authors who write books on what they call Australian Constitutional Law, and then deal only with that particular part of it which they find in The Constitution.

Just as in England, much too is unwritten. The Constitution contains no mention of party, of Prime Minister, or of Cabinet. That rightly meant little to Lord Hopetoun, the designated first Governor-General. On 26 December 1900, five days before the Commonwealth existed, he commissioned Edmund Barton to form a caretaker Ministry, as Prime Minister, until an election could be organised and held. There had of course been a brou-ha-ha when Lord Hopetoun had first selected, just seven days earlier, the leading anti- Federalist Sir William Lyne. That selection failed because no one of standing would serve with him. But no one doubted that the unwritten English position of Prime Minister had come to Australia, though The Constitution said not one word about it. No one doubted that someone had to be commissioned, and would properly be called Prime Minister. Indeed all relevant English constitutional conventions came, their form adapting to Australian conditions as they arrived. Since that time those conventions have not of course stood still. Australia has been free to develop its inheritance as has suited Australia. Perhaps the best example is the "Westminster doctrine" of the Minister's personal responsibility for what is done by his department, which Australia has developed to mean that a Minister has very little personal responsibility for what is done by his department.

Except in that last detail, all of that is like, not different from, the position in England.

The Significance of the Constitution

What is significant about The Constitution, then, is not the fact that it is written. What makes The Constitution significant is that it brings together in one document rules on many fundamental

matters, and that what that particular document contains, whether or not on an important matter, is supreme (in the senses both of prevailing over anything said elsewhere, and of being beyond the control of what Parliament says in future). It is those features which lead us to call such a document a Constitution, and it is the presence of such an instrument that distinguishes the Australian constitutional position from that of England. The Constitution is of very great importance. But the existence of this important document must not be allowed to obscure the fact that there is much constitutional law outside it. As I have said, there already was in Australia, and The Constitution operates in and as part of, a wider range of constitutional law. A great part of that law is by no means beyond the capacity of legislatures to control; and large parts of it can develop merely by practice.

Origins of a Formal Constitution

One can distinguish three factors which are likely (especially when more than one of them operate at the same time) to result in a nation having a formal Constitution, and governing the matters that Constitution is likely to deal with.

A. That the Nation is a Created Entity

The first is that the country concerned is a created (or a re-created) entity. England and some other historic European countries evolved over long centuries, growing their constitutions with them piecemeal as they evolved. In such cases many great documents may contribute to the constitution of the country, without there being any fundamental document on which all others rest. No document justifies the ultimate fundament of English constitutional law, that what the Queen in Parliament enacts is the law. So far as the Courts are concerned that rule simply exists, fundamental, unexplained, axiomatic, unchallengeable. Its acceptance rests ultimately on the sturdy slaying of those who have disputed it. Judges have known better than that. The Commonwealth of Australia, by contrast, did not evolve over the centuries. At the stroke of midnight on 31 December 1900 it sprang into existence in an instant, its Constitution with it, fully- armed like the goddess Pallas Athena.

The same is essentially true of the United States of America.

The more turbulent origins of the great republic made its period of formal creation somewhat longer, from at any rate the signing of the Declaration of Independence by fifty-six Representatives of "the united States of America" gathered "In Congress" on 4 July 1776, to the approval of "The Constitution of the United States of America" on 17 September 1787 by thirty-nine Representatives meeting under the Presidency of the man who signed himself Go. Washington of Virginia, and the coming of that Constitution into force on 4 March 1789 upon ratification by a sufficient number of States. It makes no difference that one nation and its constitution were created by Act of Parliament, the other by the action of component States; or that one was created in an instant, the other over a period of a few years. Both nations were created, and the history of each country illustrates the inevitability that such an origin will produce a document which says that the new entity exists, and says something of what it is, and how it is to work.

The same can happen where a country overthrows one system of government and replaces it with another. From the French Revolution on, Europe has provided many examples.

Although this factor requires that a founding document be created, dealing with certain matters of fundamental importance, and requires that the document be supreme in the sense of prevailing over any other existing law, it does not in itself require that the document be supreme in the sense of remaining beyond the control of the legislature it creates. What is now the State of Victoria became a self-governing colony by virtue of an Act entitled The Constitution Act, of 1854, the validity of the enactment of which rested ultimately upon an Act of the Imperial

Parliament. But s. LX of the Act provided that thereafter the Legislature of Victoria should have "full power and authority from time to time by any Act or Acts to repeal alter or vary all or any of the provisions of the Act." It may seem a tricky concept, amending the statute which gives you your own existence. Lawyers live with it easily enough. I fancy that the position is the same in most if not all of the other States.

B. That the Entity is to be Part of a Federal Structure.

The second factor likely to result in a Constitution is the creation of a federal system: "federal" in the sense that governmental power over people living in the same geographical area is to be shared between co-ordinate and independent governments operating in different spheres. Each inhabitant of an Australian State is governed partly from Canberra and partly from his own State capital, with neither of those governments able to give orders to the other. We take the existence of such a position for granted, but it is one which those who have not lived in a federation can find exceedingly difficult to comprehend. It is a requirement of such a system, that there be rules as to the sharing of power between the governments concerned. If those rules are to be known and to continue to be known, it is a practical necessity that they be written down. The location of such rules in a document called a Constitution follows almost automatically.

In the case of Australia this factor was very strong. Long and stirring had been the fight to achieve acceptable balance between the powers intended for the new Commonwealth, on the one hand, and those of the Colonies, now to be States, on the other. The Commonwealth of Australia Constitution Act opens by reciting that the people of the five States concerned (Western Australia joined in later) "have agreed to unite in one indissoluble Federal Commonwealth". Section 3 provides that the people "shall be united in a Federal Commonwealth". That was indeed the essence of what was being done.

It is obvious enough that to the extent that the existence of a Constitution flows from this factor of federalism, that Constitution requires to be not only written and fundamental, like any Constitution for the creation of a nation, but also supreme in both senses identified above. It must prevail over all other laws, and it must be beyond the control of any of the Parliaments between whom the powers are distributed.

C. A Desire for Protection Against Government

A third factor which where operative is likely to result in a Constitution is a desire to have formal guarantees of life, liberty and property against invasion by government. If such formal guarantees are to exist, there must be a document setting them out. And if they are to prevail against government, that document must prevail over all other laws, and must be beyond the control of any of the Parliaments to alter. If there is to be such a document, it is clearly appropriate that it be part of the Constitution of the country concerned. The First to the Tenth Amendments of the United States Constitution, the so-called Bill of Rights inserted on 15 December 1791, may stand as the most famous example.

In the case of Australia this factor played little part. A case for the inclusion of protections such as those contained in the Constitution of the United States was indeed put forward at the Constitutional Conventions, but it was not widely endorsed and save as to freedom of religion it was rejected. The matter is commented on in Sir Owen Dixon's paper Two Constitutions Compared, in Jesting Pilate (lst edn., 1965) at p. 102.

The Constitution and Responsible Government

I draw attention next to the fundamental distinction which exists between "responsible government" under a parliamentary system of government, where those who have executive power (the Prime Minister and Ministers) are required to be members of and are responsible to

and removable by the legislature (which is what the people actually elect); and a system of government as in the United States, where the executive (the President and through him his personally appointed Cabinet) derives its authority not from Congress but from the personal election of the President by the people. Neither the President nor any of his Cabinet is permitted to be in the Congress. A Prime Minister who does not have the support of the legislature (I am not concerned at this point with dramatic irrelevancies such as which House of the legislature) is a virtual impossibility. A Prime Minister who loses control of the legislature must go. Parliament can bring about the removal of a Prime Minister at any time, by a vote of no-confidence. Congress, by contrast, cannot remove a President. The President gains his authority not from Congress but direct from the people. That a President does not control Congress is immaterial to his position as President. I think it correct to say that every post-war Republican President has for all or (in one case) most of his presidency faced a Congress controlled by the Democrats. Indeed Democrat Presidents too have found Congress unruly enough. But Congress had nothing to do with the President's appointment, and nothing Congress can do will bring about his removal. (The exception of removal through impeachment for personal wrongdoing is more apparent than real. The Houses of the Congress are there acting as prosecutor and court, not as Houses of a legislature.)

I am not in the slightest concerned here with the question which system is to be preferred. I am concerned simply to draw attention to the difference between the system of responsible government and a system under which the head of the executive government (whether or not he is also the Head of State) derives his authority otherwise than through the elected legislature.

Each Australian Colony had (and each successor State has) a system of responsible government, as of course did (and does) England. It is no surprise that our Founding Fathers adopted the same system for the Commonwealth. I mentioned earlier Lord Hopetoun's correct assumption that the working of the Constitution they drew up required that there be a person called a Prime Minister. The view has been that it was with skill and discernment that the Founding Fathers melded this system with the requirements of a federation. Good judges have said:

"Probably the most striking achievement of the framers of the Australian instrument of government was the successful combining of the British system of parliamentary government containing an executive responsible to the legislature with American federalism. This meant that the distinction was perceived between the essential federal conception of a legal distribution of governmental powers among the parts of the system and what was accidental to federalism, though essential to British political conceptions of our time, namely the structure or composition of the legislative and executive arms of government and their mutual relations." (The Boilermakers' Case (1956) 94 C.L.R. at p. 275).

What may seem remarkable, is with how few strokes the Fathers did this. One provision of the Constitution makes the Executive power exercisable by the Governor General. Another requires the Governor General to summon an Executive Council. Another empowers him to appoint officers as Ministers of State, and says that they shall be members of the Executive Council, and that they shall not hold office for more than three months unless a member of one House or the other. There is little more. Not a word about parties, about majorities, about the election of Ministers by Caucus, about resigning if a vote of no confidence is carried, or about any of a host of such matters. In England and in the Australian colonies these matters were governed by constitutional convention, and the Founding Fathers took it for granted that when on 1 January 1901 the words they had written came to life, they would find those conventions waiting to attach.

The Drafting of a Constitution

The way the Founding Fathers dealt with responsible government was surely right. It was a Constitution they were creating, and a Constitution, said Oliver Wendell Holmes Jr., is meant to endure. A Constitution is not meant to be drawn in such terms as to soon or easily become out of date. A Constitution should be a broad and continuing document, not seeking to prescribe the answers to each generation's problems but providing the basic structure within which each passing generation will carry on and resolve the issues important to that generation. A well-drawn Constitution will leave much to be governed by other laws and by convention, inherited at the outset, and capable of change without touching the Constitution as a document at all. Each generation succeeds to that inheritance as developed to that time. Each hands the inheritance on, adapted to changing needs. As I said earlier, the Founding Fathers knew and intended that with the little they made The Constitution say as to the Executive there would flow in the whole body of constitutional law as to responsible government as existing at that time. They worked on the same basis throughout the Constitution. The point was noticed by Sir Garfield Barwick in Victoria v The Commonwealth and Hayden (1975) 134 C.L.R. 338. Speaking of the purpose of ss. 81 and 83 of The Constitution, and the suggestion that they were inserted merely to reflect the English position, Sir Garfield said:

"Sections 81 and 83 are provisions of the Constitution. Clearly, in my opinion, they were not inserted merely to reflect British parliamentary practice in cases resulting from conflicts long since resolved between King and Parliament. Rather, they are there to reflect Australian, not British, history and to implement the federal distribution of power and financial relationship upon which the colonies had resolved. If those sections were passed merely to endorse the outcome of the conflict of Crown and Parliament in the long past they were an unnecessary adornment. The British parliamentary practice would have come with the establishment of the Parliament as part of the inheritance by the Commonwealth of the common law." (My emphasis)

Where, in the ordinary case, the British practice was not spelled out in The Constitution, nothing in The Constitution would prevent the continuing development of that practice.

Amending The Constitution

In Principle Amendment Ought to be Occasional

A Constitution drawn as a Constitution ought to be, and as on the whole The Constitution was, is inherently likely to remain relevant to each passing generation. I am a great admirer of modern stationery, but a Constitution really ought not to take loose-leaf form, with each generation adding another sheaf of detailed provisions giving the received answers to what it sees as "today's" problems. If the terms of The Constitution are forever being added to and amended to deal with the particular problems of the day, in more and more detail, we may expect to finish with a document looking not so much like a Constitution as like the Income Tax Assessment Act; a document which presumably skilful draftsmen, probably kindly enough in their own homes, have turned into a waste-land containing parts which no one – – I choose my words with care – – can fairly interpret; parts where no interpretation can be said to be wrong: or right. That is not where we want The Constitution to finish.

When Amendment May be Necessary

With whatever restraint and care a Constitution is drawn, occasions will arise to consider change. That should I suggest be when dissatisfaction is widely felt as to some matter of government, and no solution is seen other than one requiring amendment to the Constitution. If some other solution is seen, that will be the way to go. Where there is no need to change the Constitution, there is a need not to change the Constitution. This, I observe, is in line with the traditional

practice of the High Court as to interpreting The Constitution. The Court's practice has been to interpret the Constitution only where the case cannot otherwise be decided. If the case can be decided on the facts, or on some other non-constitutional ground, it will be. Only if forced to it will the Court address the constitutional issue. Some have thought that in recent years the Court has shown enthusiasm to get to constitutional issues, and have been disturbed. A judge who wants to get to the constitutional point has something he wants to say. It is safer for cases to be decided by judges who need to say something, as part of the job.

Remembering the factors seen as leading to the emergence of a Constitution, the cases for amendment will in general be:

A. When some structural change is desired in the governmental entity, and it cannot be achieved consistently with the existing Constitution.

B. When some change is sought in the distribution of powers between the central and the State governments. This of course can only be achieved by amending The Constitution.

C. If it is desired to amend the protections built into The Constitution, or (in the Australian case) to have formal protections of a kind we have so far done without.

In any of these cases, if the case on the particular issue is made out we will seek to amend The Constitution, not because we set out to "reform" it, or to "bring it up to date", or to "make The Constitution relevant to today's conditions", but because in the pursuit of some specific goal of good government we found amendment of The Constitution necessary.

Forewarning and Forearming

What I have just said will I trust forewarn and forearm you for when you hear, as in this context you most surely will, the phrase "horse and buggy". When you hear that phrase you will know that someone is going to tell you that the world has changed since 1890, or 1897, or 1901, or whichever such date the speaker chooses, and therefore the Constitution must be changed, for otherwise it will become "irrelevant" to "today". Which means, if you will think about it, that The Constitution will need changing every "day" for the rest of time. On the same argument the Ten Commandments ought to have been modernised and made relevant again (I was going to say "re-relevanted", but I am terrified that some trendy enthusiast will adopt it) when quinqueremes ceased to sail to Nineveh: and periodically since. It is because the Ten Commandments were drawn in terms which did not depend on their own day, that in three and a half thousand years the day has not come when a generation has said that it finds them irrelevant, and has called for an up-date. Certain things can, it seems, be expressed reasonably permanently. The Constitution is not sacred. If faults emerge, if some provision is in fact found to inhibit our fair progress, let us surely take heart and seek to rectify it. But no recital of technical and technological change, no eloquent reference to John Nesbitt's passing parade, not even the approaching end of the second millennium of the Christian era, none of these in itself tells you that The Constitution does, or probably does, or ought to, need changing: let alone that it needs the ministrations of a host of worthy people, who at great expense (to be borne by the taxpayer) will push it and prod it and see if they can't find some way in which it could do with a change.

In one of his essays A E Housman remarks that people often find arguments easier to understand if the argument is put in physical terms. I find it useful, in Australia, to put arguments into sporting analogies. Thus would anyone say that a particular batsman should be picked for the Test team, on the basis that although he was not the best batsman available he was "good enough" to play for Australia, and in addition he was a Presbyterian and there wasn't any other Presbyterian in the team? In important areas like Test cricket that would be seen as obvious nonsense. Yet newspaper editors frequently suggest that High Court judges should be selected on similar principles. (Some say that some have been.)

In the southern States Australian Rules football is thought about by the people a good deal more than is The Constitution. There is coming up soon some important round figure anniversary or other for Australian Rules Football. No one has yet suggested that this means that a Commission should be appointed to lead a decade of debate to ensure that the rules of football remain relevant to today's conditions. The suggestion would seem absurd. When Polly Farmer's attacking handball and in turn the adoption of the running game changed the face of how such football is played, no one suggested that the rules "had" to be amended to reflect the change. Things went on as before, changing the rules if the playing of football disclosed some defect, and otherwise leaving the rules alone and playing the football. No one suggested, when the Centenary Test match was being arranged a few years ago, that those hoary old laws of cricket (dating from long before 1890) must surely need reconsideration. In these important areas we handle the rules with respect. It is just possible that the Constitution merits similar treatment.

It is salutary to take warning from our recent past. In 1977 there was inserted into The Constitution a new s. 15, designed to ensure that a replacement Senator appointed to complete the term of a Senator whose place has for some reason become vacant, shall be of the same political party as that Senator.

For sections 7 to 23 of the Constitution (including the original section 15), covering every issue concerning the Senate, the Founding Fathers needed (in the copy before me) 32 cm. of print. In the same copy, this 1977 version of cl. 15 requires on its own 26cm. In a Constitution of 128 clauses, this abhorrent s. 15 contains some 5% of the whole Constitution. It is approximately 1000 words long. Lincoln needed 265 words for the Gettysburg Address. In the United States Constitution 1000 words contains the following amendments:

Amendments 1 to 10, the Bill of Rights
Amendment 13, Prohibition of slavery
Amendment 15, Negro suffrage Amendment
Amendment 17, Popular election of Senators
Amendment 18, Prohibition
Amendment 19, Women's suffrage
Amendment 21, Repeal of Prohibition.

And in 1977 Australia solemnly put into The Constitution that number of words to ensure that never again could a Mr Bjelke-Petersen appoint a Senator Field to fill the vacancy created when a Mr Whitlam appointed a Senator Gair as Ambassador to Ireland and the Holy See. Used that number of words to deal most clumsily with a matter which is pre-eminently one to be dealt with outside the Constitution. All political parties joined in inserting into The Constitution this utterly inappropriate little tribute to the importance of political parties. Is it any wonder that one awaits with trepidation the turgid drafting that trendy enthusiasts would seek to put into The Constitution to celebrate the end of a millennium?

Some Teachings of The Constitutional Centenary Foundation

In recent times there has been formed the Constitutional Centenary Foundation, Inc., under the chairmanship of Sir Ninian Stephen. It is the third of a series of such bodies, all overtly designed to proceed and lead debate in a neutral fashion. In 1973 the Whitlam Government set up the Australian Constitutional Convention . In December 1985 the Hawke Government established the Constitutional Commission. Now the Keating Government has launched the Constitutional Centenary Foundation, Inc. (How Australian can a name be ?) Truly our central masters are determined to sponsor neutral debate as often and for as long as it takes them to get what they want.

The Foundation's first Newsletter, published in April 1992, is full of interest. An opening paper, The Constitutional Decade, is attributed to the Chairman. There is a "Concluding Statement"

from a Constitutional Centenary Conference held in 1991, and there are papers by Professor Cheryl Saunders and Mr Padraic P McGuinness. Various matters warrant remark.

Sir Ninian expectedly leads off with "horses and buggies", though with trendily different terminology ("carriages to cars", "cavalry to nuclear weapons"). It has been a century "of extraordinary change" (unlike say the l9th century, which in a period of some forty unchanging years invented railways, steamships, chloroform, the telegraph, sewerage, and vaccination). The inevitable follow-up comes to time, but it goes far further than any similar statement I have previously seen:

"The great curiosity of our system of government, however, is that the formal structure of the entire federal system has remained substantially unchanged since it was laid down in the constitution adopted by the people of Australia nearly a century ago. The so-called Westminster system and its conventions, the conduct of parliaments, the structure and role of local governments, indeed the whole structure of our polity has remained in its formal detail very much as it was laid down at the beginning of federation."

I confess that I look at that passage with astonishment, especially coming as it does from the man whose own hand wrote the Governor-General's assent to the Australia Act 1986, and coming as it does immediately after a passage reading:

"Many aspects of life in Australia have been influenced by and have adapted to these changes, including the way in which our democracy works in fact, as distinct from the theoretical model of a hundred years ago."

Time does not permit me to pursue every hare (no: every rabbit – they are more prolific) down every burrow. But in particular:

1. You will see, if you examine the passage in the light of what I have said earlier, a totally inappropriate equating of The Constitution on the one hand and "the whole structure of our polity" on the other.

2. How can it possibly be said that "the whole structure of our polity has remained in its formal detail very much as it was laid down at the beginning of federation", in the presence of the Statute of Westminster 1931 and the Australia Act 1986 ? (And a great deal more).

3. The "so-called Westminster system and its conventions" was not "laid down" (scil., in the Constitution) "at the beginning of federation". What was laid down at the beginning of federation was The Constitution, and The Constitution contains not one word about that system and its conventions, "in its formal detail" or at all. The Constitution said only that Ministers of State have to be in the legislature.

4. No doubt there are descriptions in books of parts or (ambitious books) the whole of "the so-called Westminster system and its conventions", but the system has never been "laid down" anywhere, "in its formal detail" or otherwise. The whole point of much of it is that it is not laid down.

5. A fundamental feature of conventions is that they do not have "formal detail".

6. Is there any reason for the pejorative "so-called" ? Is it more than an encouragement to get away from traditional ideas as to constitutional practice?

7. There is a flat contradiction between saying that "the way in which our democracy works in fact, as distinct from the theoretical model of a hundred years ago" has adapted to the extraordinary changes of our century, and saying that the "whole structure of our polity", including its conventions, has remained "very much as it was" in 1901. Conventions are based on what happens; are based "on the way our democracy works in practice". Change the one and you change the other.

8. The Constitution does not contain one word about "the structure and role of local government". Local government is not mentioned in the Constitution at all. Whatever is or is not hampering whatever development is or is not wanted, nothing in the Constitution is hampering it.
Bringing it all together: First, if there is to be a comparison at all then the relevant one is not that between the outside world and the single document called The Constitution, but that between the outside world and the total constitutional arrangements of the country. In saying that "the way in which our democracy works in fact" has adapted to the outside changes, Sir Ninian undermines the contrast he seeks to draw. But in any event it is not at all obvious that any constitutional arrangements ought to change, and least of all those set out in The Constitution, simply because they have been and now are faced with new problems and situations. Good constitutional arrangements are designed to do just that.
Sir Ninian also says, again expectedly, that "now" is very much the time for "an examination of our political system and its structures". He refers to the pending arrival of the 21st Century (an event which one must admit will happen), and the centenary of our federation. The theme is a popular one. The Concluding Statement calls for a process of review of the Australian constitutional system to be completed by the year 2000, and says that the 1990's "provides (sic) an opportunity to review the Australian constitutional system". Why the opportunity is greater than that provided by any other decade it forbears telling us. Professor Saunders tells us that the approach of the centenary of federation "provides a symbolic opportunity for constitutional review". So it might, but things can be symbolic without being sensible. Even Mr McGuinness, who writes the two most sensible papers in the Newsletter, thinks that "everyone now agrees that this decade ought to be a time for debate and information". Faced with such unanimity it seems well to remind oneself that in the last decade of the first millennium good and learned people throughout Christendom expected the second coming of Christ and the end of the world to occur in holy tandem at the end of the year 1000, and bade the fearful make ready.
Perhaps there is still time to query all these propositions.
What in the end Sir Ninian's Cavalcade of Change point comes to, is that Australia has coped with and accommodated to vast changes, within the existing structure of The Constitution, which remains largely as enacted in 1900. I should have thought that would lead one to praise The Constitution, rather than to lead the debate to consider its modernisation and to wonder whether we "might call our fundamental governmental structures into question". Anyone who replies that in certain areas the accommodation which has been reached is inappropriate is in danger of agreeing with me, that you should not set out to "modernise" The Constitution at all, or on any other grand project of that sort, but rather that you should come at seeking to amend The Constitution only if, in some particular respect, experience reveals some defect of governmental arrangements which can be rectified in no other way. That does not mean that the end of a millennium or any other magically round number need provoke us to tinker concernedly with what is not causing trouble. Let us, at all costs, not have The Constitution treated in the way that led to Professor T.G. Tucker's textual conjectures in his edition of The Supplices of Aeschylus receiving the criticism:
"In practice no word, however good, is safe if Mr Tucker can think of a similar word which is not much worse."

A Comparison with the United States

Certainly Australia must make up its own mind what to do. But some comparison with the history of the Constitution which served as a model for our own seems not out of place. I make three points.
First, American practice accepts fully the importance of convention. What Section 1 of Article II of the Constitution says as to the election of the President of the United States, is that the election

shall be by Electors nominated by the various State legislatures, who will send their votes to be opened by the President of the Senate, and counted under his direction. Not a word about parties, candidates, primaries, Conventions, lapel-buttons, balloons, or any other part of what people like us thought were essential parts of the election of a President. Nay, not a word about the fact that the citizens of each State of the Union will vote on the matter, and will expect their vote to be determinative. No American seems to be dismayed by this. None expects world-wide tension as the votes for President are counted in the Senate chamber. None doubts that when the votes are unsealed and examined it will be found that each Elector, in compliance with utterly binding convention, has voted in accordance with the popular vote in his or her State. What no one has suggested, is that this development of popular binding guidance for the Electors makes it necessary to re-draw Section 1 of Article II of the Constitution to make it give all the detail of what happens, in terms "relevant to today".

The United States not only accepts such situations, but feeds them. In recent years it was decided that the citizens of the District of Columbia should have a vote for the President, just like citizens of States. To this end the 23rd Amendment was brought forward. What it did not say was that the citizens of the District of Columbia should be entitled to a vote on the matter. It said simply that the District shall be entitled to as many Electors as if the District were a State. All America knew that the rest would follow.

Secondly, the United States Constitution has been the subject of twenty-six amendments in 215 years. That includes the First to the Tenth Amendments, the Bill of Rights. Those amendments were proposed in a bunch on 25 September 1789 and were essentially a deferred part of the adoption of the original Constitution. Two amendments at least represented very special cases of a social programme being reflected into the Constitution (Prohibition and Abolition). That leaves a total of 14 true amendments in 215 years, a good deal fewer than Australia's allegedly restrictive 8 amendments in 91 years. Since the foundation of the Commonwealth of Australia, the United States has amended its Constitution nine times: not dramatically different from Australia's eight times. America's immense power (in "horse and buggy" terms, the United States didn't just watch others develop nuclear weapons and power: it invented them), its super-power status, all came without one constitutional amendment giving the central government more power. (The only amendments which have ever given increased powers to the government of the United States are the 16th and the l9th Amendments: power to impose income tax, and power, since gone, to enforce Prohibition.)

Thirdly, and somehow it comes as no surprise, the United States let its two-hundredth birthday pass with no sign of a call to re-assemble (perhaps in false beards) some latter day State representatives in Congress under some latter-day Go. Washington of Virginia, to look anxiously at Ben. Franklin's old effort (written before the days of the buggy, though they did have horses) and see what they could do to make it relevant again. Perhaps their history had taught them something of what a Constitution is for. Perhaps they were kept from folly by having too much respect for their Constitution, and knowing too much of what Constitutions are and should be.

Conclusion

We are asked to take for granted the necessity for an utterly different approach. We are it seems to start again; in Sir Ninian's words, "to help lay the foundations for a system of government that accords with the realities of today and the needs of tomorrow". Here we poor deluded mortals were, some of us, thinking that we had "a system of government which accords with the realities of today" (whatever the words mean), while so help me Sir Ninian now reveals to us in a neutral debate-leading fashion that at present we do not have even the foundations for such a system of government. Those old Founding Fathers wrought even worse than we thought. On the other hand, perhaps they didn't. One can take some comfort from the remark of the great humourist

Tom Lehrer, about the counsellor who "made his living giving helpful advice to people who were happier than he was".

Chapter Three

Constitutional Reform: The Tortoise or the Hare?

Greg Craven

Introduction

I would like to make the point at the outset that I regard this first conference of The Samuel Griffith Society as an important event. It is important, firstly, because it comes at a time when Australians are talking more about their Constitution than at any other point in their history. Whatever one thinks should or should not be done about the Constitution, there can be little doubt that a willingness to talk about it is a far more acceptable position than the traditional attitude of Australians, which is to take their Constitution entirely for granted. The conference is also important because it represents something of a rare attempt to create a true dialogue on the Constitution. It has been common enough in Australia's history for there to be in existence some official or quasi-official body trying to reform the Constitution: thus, in recent years, we have had the Australian Constitutional Convention, the Constitutional Commission, and now the Constitutional Foundation. But the organising body behind this conference comprises, so far as I am aware, the first bid to set up a society equipped to engage independently in a vigorous general constitutional debate with what might be termed the official movement for constitutional reform. Right, wrong or somewhere in between, its efforts are thus to be applauded as contributing much needed diversity to the field of constitutional discussion.

What I propose to discuss in this paper is the `process' of constitutional reform. Consequently, I will not directly address any particular proposed measure of reform, but rather the general means by which constitutional reform as a politico-legal phenomenon in Australia is to be approached. This is a large subject, and what follows is essentially a mere sequence of connected thoughts, which I hope are relevant to the subject at hand, but which appear in no very settled or sophisticated order.

History

The logical point to begin necessarily is with a discussion of the history of constitutional reform in Australia. This discussion is not offered as the inevitable irrelevant historical introduction to any academic dissertation. Rather, it appears here because the history of constitutional reform in this country is of the utmost relevance in seeking to understand the likely future of that process. The first thing which needs to be understood is that the Founding Fathers were positively in favour of at least a moderate measure of continuing constitutional reform. They did not anticipate that their work would endure unchanged forever, and this is why they included in the Constitution section 128, which provides one of the most democratic means of amending a constitution contained in any federal constituent document around the world.

Their attitude was undoubtedly a wise one, as change is inevitable under any constitutional regime. Unavoidably, the circumstances of nations alter, and if their constitution is to survive, it must faithfully reflect the nature of these changes. Thus, for example, our Constitution as written conferred upon the Commonwealth Parliament the power to make laws for persons of any race,

other than persons of the aboriginal race. This accorded with views prevailing in 1900, but sixty years later our beliefs and values – quite unsurprisingly – had changed, and in 1967 the constitutional position was democratically altered to extend the power of the Commonwealth after the holding of a referendum under section 128. The ghosts of the Founding Fathers would have been monumentally unconcerned.

Given this inevitability of constitutional change, the real question in the present context is always going to be not `whether', but `what', `how much', `when', and `in what way'? Historically, the push for constitutional reform in Australia has nearly always come from the Left. Labor made a number of determined attempts to expand the power of the Commonwealth in the early years of the federation, and this pattern was followed under the government of Gough Whitlam, and even on a more modest basis during the administration of Bob Hawke, partly via the agency of the ill-fated Constitutional Commission. The main impetus for Labor's attempts to change the Constitution is to be found in the impediments that its federal structure places upon Labor's generally centralising agenda. Labor also has had a general dislike for a number of the other themes running through the Constitution, particularly those tending to impose checks and balances upon the exercise of governmental power, and so inhibiting the capacity of an appropriately- minded Labor government to radically re-structure society.

Correspondingly, there has been (with certain very isolated exceptions) no very resolute push for constitutional change from conservatives. Generally, they have been content to maintain the Constitution unaltered, paradoxically, even after it has been pushed in directions by such forces as the current of High Court decision-making which they would otherwise find unpalatable. Given that conservatives have tended to focus on constitutional issues only when compelled to do so by the existence of some particularly virulent push from the Left for constitutional revision, the result effectively has been a constitutional non- debate in Australia. In fact, interest in the Constitution is essentially a phenomenon of left-wing hostility, a highly unhealthy position in a democracy. One can, of course, except from this last statement the body of constitutional academics, who obviously are intensely interested in constitutional reform as a matter of professional involvement. However, as these have tended to come from a similarly Left-centralising perspective to Labor itself, they have ordinarily done little to increase the degree of diversity in the debate.

Of course the one single, salient truth that emerges from any examination of the history of Australian constitutional reform, is that the people consistently vote against change. One can argue about why this has occurred, but not about the central, uncompromising fact. So far, only eight out of 42 constitutional referenda have been successful, and the last four attempts to amend the Constitution were defeated by record majorities. What this signifies above anything else, is that a person interested in constitutional reform must face the fact, and that at the very outset, that they are confronted by a formidable task.

Constitutional Myths

It is important at this point to explore some of the myths that have grown up in Australia around the concept of constitutional reform. The first is that the Constitution itself is a shambling document, cobbled incompetently together in the latter part of the nineteenth century, and in perpetual danger of imminent disintegration. This perception is entirely wrong. The Constitution is in essence a carefully thought out scheme of government which, in common with all products of human ingenuity, suffers unavoidably from its fair share of misconceptions and errors. But the basic point must be that the Constitution has presided over one of the most impressive functioning democracies in the world for 90 years, and has weathered every crisis – sometimes rocking noticeably upon its undercarriage – without serious danger of collapse. In all probability, were the Constitution to remain entirely unchanged for another 50 years, Australian democracy

as such would manage to survive under its aegis. Naturally, this rather minimally favourable prognosis is no reason why it should, as a matter of fact, be preserved from alteration.

A similar myth is that the Constitution is pitifully derivative of a British imperial past, and never really proceeded from the Australian people. This myth holds an honoured place as part of the attempt by socialist historians like Manning Clarke to fashion an alternative Australian epic history out of the unpromising facts of the past. Again, however, the myth is very far removed from the reality. In fact, the Constitution – while inevitably relying heavily on aspects of Australia's British past – departs in a highly innovative fashion from that tradition in a wide variety of its aspects, most particularly in its treatment of federalism, as well as in areas like constitutional amendment. As regards its popular basis, it must be remembered that the Founding Fathers (unlike historians) were popularly elected, and that the draft Constitution was ratified not once, but twice by the people of Australia.

Probably the most important myth of constitutional reform is that people vote `No' at referenda because they are stupid. Australia's intellectual elites sometimes try to make this charge more palatable by talking with sympathetic condescension of the difficulty experienced by `ordinary' people in understanding complex constitutional proposals, but the notion of intellectual ineptitude remains at the heart of the accusation. Author after author has recriminated the Australian population for not being clever enough to understand the incalculable benefits offered to it in the form of proposed constitutional amendments by a medley of intellectual enforcers.

There are a number of possible responses to this essentially arrogant understanding of Australia's constitutional history. In the first place, it ignores (or down-plays) the crucial feature of democracy, that everyone has an absolute right to their own opinion, and even the absolute right to be wrong. Secondly, it entirely discounts the possibility that people may have voted `No' in a particular case because what was proposed was actually a bad idea. Anyone who has studied the various proposals made at referenda will quickly appreciate that Australia has had more than its fair share of constitutional lemons for sale. Thirdly, centralising constitutional thinkers (who probably comprise a majority of those in favour of radical change to the Australian Constitution) conveniently ignore the fact that Australians have overwhelmingly voted `No' to particular sorts of constitutional proposals. Historically, these have been proposals that seek to increase the powers of Canberra at the expense of those of the States, and such initiatives have had a disproportionately high casualty rate at referendum: on my rough count, only one constitutional proposal out of twenty-five which were solely concerned with the enhancement of central power has succeeded at referendum, whereas the figure for federally `neutral' proposals is a much more respectable seven out of fifteen. Finally, to the extent that the idiocy argument may be sanitised, so as to read that people vote `No' because they are conservative, and not fully understanding proposals and their implications prefer to vote in the negative to be on the safe side, this is a far from unreasonable or irrational human response.

Of course, none of this goes to deny that there are real problems in the present amendment process. One of the most obvious of these is the fact that virtually every proposal for constitutional reform quickly becomes a partisan issue. The result is that just as the government of the day will support such a proposal, so the opposition will oppose, almost regardless of whether the matter in question is a good or bad idea. These, and many other difficulties, have to be confronted by would-be constitutional reformers.

Constitutional Realities

Having discussed the myths, we may now turn to the realities of constitutional reform. In the first place, however fascinating the subject may be to politicians and academics, the fact has to be faced that it is hard to get the population at large interested in any aspect of the topic. This is not necessarily because they are bovine or unperceptive. In any particular case, it may be because the

people as a body feel that the system works at least reasonably well, and perceive no need for change. It has also to be accepted that every attempt at major constitutional change in Australia has failed miserably. The mega-attempts of the Commonwealth to radically alter the federal balance of power during the period 1911 to 1946 were completely unsuccessful. The Constitutional Convention, whose agenda for constitutional change was comparatively modest, met with only limited (though nevertheless significant) success. The Constitutional Commission, which was peddling by far the most ambitious program of constitutional change in Australia's history, was also the most spectacular failure.

Paradoxically, there has been a good deal of informal change to the Commonwealth Constitution, notwithstanding the repeated failure of referenda. This has occurred mainly through the agency of the High Court, which has substantially rewritten large portions of the Constitution in its judgements. It is a mere common-place of Australian constitutional history that the Court has, for example, fundamentally re-drawn the federal division of power. Nor has the High Court been the only agent of informal constitutional change. The intricate processes of fiscal federalism, which have operated to produce indigent States heavily reliant upon Commonwealth grants, and so highly susceptible to Commonwealth pressure, have also altered the practical operation of the Constitution.

It needs to be understood that there is indeed a real need for appraisal and change in relation to our Constitution, even (oddly enough) from the point of view of anyone who is essentially a constitutional conservative, and who wants to keep the Constitution as it is, or at least as it was meant to be. This is because certain fundamental aspects of the existing Constitution are currently under serious threat. For example, the federal character of the Constitution is undermined both by the centralising tendencies of the High Court, and by the vertical fiscal imbalance that has grown up in the Australian federation. The rights of Parliament are challenged by the dominance of the executive, as exhibited by such distressing phenomena as the debasement of Question Time, and the undermining of the office of Speaker. Judicial independence is in grave danger of erosion, both from widespread executive contempt, and from the tribunalisation of justice. General respect for human rights is also a potential casualty of executive instrumentalism. Thus, notwithstanding the fact that the Constitution could probably muddle along indefinitely without any real danger of total collapse, there is undeniably a need for some action if we wish to ensure that it fully retains its essential character. Naturally, it goes without saying that if one is in favour of radical change in Australia's constitutional structure, the case for constitutional reform is compelling.

Approaches to Constitutional Reform

We may now turn directly to the question of approaches to constitutional reform. By this is meant not particular mechanisms adapted to the end of changing the Constitution, but general attitudes to the entire process of constitutional reform, which attitudes will in turn determine which specific technical courses are to be adopted. Naturally, this assumes that some degree of constitutional reform is in fact desirable.

It is possible in Australia to discern at least two general approaches to constitutional reform. One may be labelled constitutional `gradualism', while the other may be referred to as constitutional `adventurism' or (perhaps less pejoratively) constitutional `experimentation'. Proponents of constitutional gradualism accept the need for constitutional reform, but argue that this is a process which unavoidably takes a good deal of time. They are never in a hurry. They believe that it is necessary to carefully isolate each separate constitutional problem, to study it in depth, and then to take the requisite step of constitutional reform cautiously and deliberately. The entire approach is one of taking one step at a time, making sure that at every point one can predict the precise consequences of the change being made. To a significant extent, this was the approach of

the old Australian Constitutional Convention, which tended to be suspicious of dramatic constitutional initiatives.

Constitutional adventurism is a very different approach, and one whose proponents are inclined to view gradualism as simple cowardice. Constitutional adventurists – who frankly frighten the present author – favour the constitutional equivalent of the king-hit. They are characteristically inclined to the dramatic, and believe that if one gets the principle right, the practicalities will surely follow: it is not necessary to be able to predict all potential ramifications of a constitutional amendment before becoming convinced of its wisdom. This conviction grounds a corresponding belief that it is possible effectively to make sweeping changes to the Constitution. Naturally, adventurists tend to assume that a great deal is wrong with the Constitution, and that there is a correspondingly grave need for fundamental constitutional revision.

Constitutional adventurism is far from unknown in Australian history. It naturally has been most popular with Labor, which has seen a need for radical constitutional change in a variety of contexts. It is also popular with constitutional academics, who often seem to suffer from what could be called `Founding Fathers' syndrome. This is the tendency in the context of constitutional reform to wish to do something, anything, so long as it is spectacular, and will ensure that its author will be remembered. After all, who wants to fail to go down in history as the person who made a number of modest changes to the Constitution, when you could be remembered as a second Edmund Barton?

The Dangers of the Two Approaches

Obviously, constitutional gradualism and constitutional adventurism are the tortoise and the hare of the title to this paper. The question is, what dangers are involved in each? The difficulty with constitutional gradualism is that it may be so slow that it will achieve nothing at all. Indeed, it may be a convenient front for those who are working for precisely this end. Certainly, constitutional gradualism will be a hopeless course if the need for reform is urgent and profound – in such circumstances, gradualism will be next to useless. In fact, constitutional gradualism is useful as a strategy of constitutional reform only if one believes that one's constitutional system is at least sufficiently sound (even if significantly vulnerable) as to allow the time necessary for renovation. This is the position adopted by the present writer, but he acknowledges that he conceivably may be wrong.

A variety of dangers attend constitutional adventurism. The first concerns the unpredictability of its results. The drawback of doing something big because it seemed like a good idea at the time is that one will all too often be free to repent at leisure. A good example of this phenomenon is the inclusion in the Canadian Charter of Rights and Freedoms of a clause which allowed Parliaments to override the operation of the Charter. This was seen as a sufficient sop to those concerned by the potential of the Charter to undermine Parliamentary democracy. Yet time has proved that Parliaments are politically incapable of solemnly declaring that they intend to override the Charter, with the consequence that the override clause is next to useless outside Quebec. A major supposition and safeguard of the Charter has thus proved to be substantially without foundation.

A second danger is that of exceeding community consensus. Constitutions depend absolutely upon their general acceptance by the populations over which they preside. The more dramatic a particular constitutional reform, the greater the danger that it will alienate large sections of the community. In this connection, it is not enough for a major constitutional change to be able to scrape together a transitory majority: a far firmer grounding in community consensus is required if future trouble is to be avoided. Again, the example is the Canadian Charter. Pierre Trudeau was determined to secure the passage of the Charter, and in so doing rode rough-shod over the objections of Quebec. This harsh treatment went a long way towards causing the present

resentment of Quebec, which has resulted in Canada having to face the grave threat of secession. Trudeau had a charter for his federation, but the question remains whether he has a federation for his charter.

It must also be accepted that constitutional adventurism readily lends itself to grandiose, ill-thought out schemes. It is always going to be the chosen medium of those constitutionalists who shoot first and ask questions later: those inclined to this approach towards constitutional reform are inherently intolerant of the counsels of caution and moderation. It needs always to be remembered in this context, that if once one succeeds in amending a constitution, then no matter how bad the results may be, it will frequently be extremely difficult to undo the alteration.

The Way Forward – The Constitutional Foundation?

The Constitutional Foundation is currently the reigning body of constitutional reform in Australia. It arose out of the conference held at Sydney to commemorate the 1891 meeting of the Founding Fathers, and which comprised a variety of community leaders, academics, trade unionists, business people, and (on its final day) politicians. The Foundation's designated task is to ferment discussion of constitutional reform and to educate the public, and it eschews any political agenda. All here would realise that the creation of The Samuel Griffith Society is largely a response to the existence of the Foundation.

It must be accepted that the broad role of the Foundation in promoting constitutional discussion is entirely appropriate, and worthy of support. Nevertheless, the following cautions concerning its future role and operation need to be born in mind. For a body like the Foundation, there will always be temptations towards constitutional adventurism. There is an understandable desire on the part of such bodies to do something truly memorable in order that their impact upon Australian society may be both large and readily recognised. There will be pressures upon the members of the Foundation – both internal and external – to seize the opportunity to be Australia's second generation of Founding Fathers. Such pressures are not necessarily conducive to careful, cogent constitutional reform.

The attempt of the Foundation to be non-political is also fraught with difficulty. So far, it largely has been able to avoid controversy simply by taking no overt position on any divisive constitutional issue. Yet it seems most likely that a series of positions will sooner or later have to be adopted, at least by implication, and at that point, the usual difficulties of partisan politics will inevitably arise. Of course, it might be argued that the Foundation will never have to adopt any set position, but in this case, it is difficult to see what it hopes to achieve. Education is all very well, but seminars and pamphlets alone will never be able to carry the day for the cause of constitutional reform.

As it happens, my own guess – based on the nature and composition of the Foundation – is that it will eventually adopt a whole series of constitutional positions. Indeed, it may already be perceived as beginning to lean tentatively towards certain constitutional outcomes, something which is perfectly appropriate in itself, however much it may in the future compromise the `neutrality' of the Foundation. Thus, it appears to me likely (though by no means certain) that the Foundation is moving in the direction of support for a judicially enforceable constitutional bill of rights, some form of treaty or formal instrument of understanding with the aborigines, and a republic. All these things are highly controversial (though arguably desirable) constitutional options, advocacy of which will arouse passionate political debate and division. The view of the present author is that any proposal for a bill of rights, in particular, readily lends itself to an adventurist agenda of constitutional reform.

In any event, it can be argued that the attempts of the Foundation to be absolutely apolitical have been doomed virtually from the outset. The very choice made by the Foundation as to which aspects of the Constitution should or should not be discussed as being in need of reform

necessarily carries with it a series of suppositions as to the desirable shape of a future Australian Constitution. Thus, the Foundation's evident willingness to open up the republican debate, while laudable enough as a means of broadening constitutional discussion, gives at least some hint that the body is not entirely enamoured of the monarchy.

A final difficulty of the Foundation flows from its nature as a body composed very much of Australia's intellectual elites. At its most ambitious, the Foundation sometimes seems to be aiming at beginning, conducting and resolving the current constitutional debate. It does not appear (or at least it is not clear) that the Foundation is primarily concerned to identify issues for discussion, and then to hand them over to some body in the nature of a constituent assembly. My own belief has always been that if one is to engage in `macro-constitutional reform', it is necessary to adopt the same mechanism as that preferred by the Founding Fathers, and to have a constitution written for Australia by a democratically elected body charged with that specific task, rather than by a self-appointed intellectual elite.

Conclusion

There can be little doubt that Australia is facing a testing constitutional time. This is not a cause for concern: we are long overdue for a careful examination of our constitutional assumptions and suppositions. We have much to think about and to debate. But the first thing we must consider is the question of our general approach to constitutional reform. Are we to be gradualist tortoises, or adventurist hares? My own preference is in broad terms for the former, but the one thing that is imperative is that there be a serious debate. This is the reason that a body like The Samuel Griffith Society should exist.

Chapter Four

Keeping Government at Bay: The Case for a Bill of Rights

Frank Devine

Let me begin by quoting a notable American president: "Were it left to me to decide whether to have a government without newspapers or newspapers without government, I would choose television every time."
That was Ronald Reagan sidestepping Jeffersonian sententiousness. Here is a morsel of Confucius in compensation to those who miss Jefferson: "Government requires food, weapons and the confidence of the people. It could, if necessary, do without the first two but never without the last."
I lean somewhat to Reaganian reasoning in framing some of my positions on the Constitution. Were it left to me to decide whether Australia should be a constitutional monarchy or a democratic republic, for example, I would unhesitatingly settle for either.
But I am not certain we have taken the necessary steps to make sure we have that choice. In particular, I believe that our Constitution provides insufficient safeguards for our democratic institutions in the absence of a monarch, and that we cannot count on the monarchical system's indefinitely retaining enough popular confidence to survive.
The present republican movement is frivolous in the sense that it concerns itself almost exclusively with getting rid of the Queen, and very little with replacing the monarchy with something of value. But I think Kenneally, Turnbull and the other fashionable republicans voice, in their way, a still somewhat incoherent but widespread Australian uneasiness with the monarchy.
The tepid public response to the Queen during her recent visit reflected, if not indifference, a degree of discomfort, of people holding back because they were not sure of their own feelings. The Queen's reception was on a par with that accorded President Bush, who preceded her by a short span, and was known just to be dropping in on his way somewhere else.
Bush had an advantage as a politician of being able repeatedly to describe his welcome as extraordinarily warm, a benchmark in the annals of state visiting. He soon had us convinced this was the case. In fact, the President did okay. He is an affable man with a cheerful wife and we responded cordially.
We were, moreover, fairly interested in the content of the visit, which got a boost and a plot line from the President's promises – subsequently honoured – not to get too much in the way of Australian wheat exports while turning the heat on Europe's agricultural protectionists.
We offered a comparable level of friendliness to the Queen.
We have known her a long time, and she has lived up to our best expectations. But before she had been here long you had the impression that this was not so much a royal visit as a celebrity visit by the mad dogs of Fleet Street. There were headlines about Mrs Keating not curtseying, Mr Keating laying hands on Her Majesty's waist. We saw Mr Keating boring the Queen with dissertations about our Asian future, and Beefy Botham taking offence at our jokes about her.
A few alert constitutionalists pointed out that Her Majesty was the Queen of Australia and that we were quite capable of taking care of her without any help from pompous Poms. But most

people accepted the appropriateness of British criticism, whether irritated, amused or indifferent. One might ask, therefore: what is the point of having a Queen if a lot of people don't really think she is yours, and you are none too sure yourself?

The virtues of a constitutional monarchy in contemporary times are numerous. One observes the greater stability enjoyed since World War II by the West European countries that have retained the monarchy – including Britain. Franco's brilliant decision to restore the royal family in Spain, and its admirable consequences for the Spanish, provide dramatic evidence of the power of the institution. It is difficult to think of any other means by which Franco could have ensured the preservation of Spanish nationhood after his own death.

For most of the past 400 years Japanese militarists have been able to control their country by effectively seizing the person of the Emperor. It is significant that even the most ruthless and self-confident Tokugawa dictators, let alone the sword-swinging admirals and generals of the 1930s, were unwilling to claim absolute power in their own right.

Moreover, it can be argued that by surrendering its power to the people at large, as it has largely done since the Occupation, the throne of Japan has enhanced its effective authority and made itself safer from Tokugawa kidnappers of the future. His person is now defended by a palace guard several million strong.

In Thailand recently, a constitutional monarch invoked the reserve powers whose existence denies to anybody else legitimate aspiration to final power, and guided his country back from the brink of civil war, publicly humiliating and then dismissing a prime minister who had not hesitated to turn guns on his own countrymen.

In theory, preserving our constitutional monarchy is the best way for Australians, as well, to guarantee our future stability and continuity of government, and keep a brake on the excessively ambitious and authoritarian.

In practice, though, the monarchy's influence seems to be fading. It lost much of its potency with the passing of the Australia Act of 1986. This is by no means a welcome reality, for the fading of the Crown's residual authority is creating a power vacuum and some rather sinister shapes are starting to swirl around it.

I am aware that the inaugural position of The Samuel Griffith Society may be a desire to defend the present Constitution and counter authoritarianism through its federalist provisions. With a symbolic royal presence in our future by no means guaranteed, however, I am not altogether confident that the authority of the States as presently defined will be sufficient to resist a determined centralist power grab. Nor do I detect any mechanism, absent the monarchy, by which we will be able to guarantee ourselves open and responsible State governments.

A perfectly logical response to this is, of course: why even entertain the idea of giving up the monarchy? It is a matter of accepting the advice of Confucius. I fear it may be an uphill struggle for any federal government, no matter how great the will, to win popular support for an essentially absentee Queen or King.

Consider the informal infrastructure that supports modern monarchies. There are the huge families they have begat and, for the most part, continue to beget despite marital difficulties. All those thousands of brothers and sisters, uncles and aunts, nephews and nieces, cousins to almost incalculable degrees, successors to the throne meticulously numbered into the hundreds, have their parts to play.

They comprise a powerful network, binding society rather like steel mesh does concrete structures. They give shape to a permanent social hierarchy, relatively unassertive these days, but comfortingly immune to election upheavals and stock market explosions. The outer royals, by swimming with the fish like coroneted Maoist guerrillas, defend the monarchy against fossilisation and keep the inner royals more or less, and somewhat hazardously up-to-date and in

tune with the society in which they live. Note that qualification: up-to-date with the society in which they live.

The extended royal family extends ripples of glamour to nearly all corners of that society. Even drunk or boring or both, a royal – even a collateral royal – spices up a party. A royal opening one's new domestic science block nudges the event into the outskirts of history.

The outer royals get help in gluing society together and washing it with a patina of glamour from numerous aristocratic families, some of whose members continue to make use of their privileges to become exceptional individuals. Around them is a relatively large number of citizens who have been conspicuously rewarded by the monarch for outstanding achievement or long public service.

For no good reason that I can see, we have forsaken such painlessly retainable institutions as, for example, conspicuous recognition in the Queen's name. The Order of Australia is, for instance, much less conspicuous than a barony or a knighthood and, practically speaking, does not demand the intervention of the Queen.

When we attempt to sustain a monarchy in Australia, therefore, we do so without some of its most important bulwarks and accoutrements. Even the social excitement that once surrounded the activities of the monarchs and their representatives seems to have faded. I am aware of no Government House that is these days considered a glittering salon. At least in Sydney there seemed no perceptible quickening of the social pace during the Queen's most recent visit.

When I put the question to several people encountered during the past week, I found at least a couple of handfuls who remembered more or less why President Bush had come here and what he had done. But nobody with whom I raised the matter remembered the reason for the Queen's visit, or what she had done, except somehow be insulted.

I do not make these somewhat disagreeable observations in the belief that the monarchy has not served Australia very well, or that it could not continue to do so. But we possess too few of the trappings, and have recently discarded so many of the traditions we once honoured, to be sure that a foreign monarch will remain sufficiently attractive to Australians to override the claims of constitutional alternatives.

Geoffrey Sawer makes a tongue-in-cheek assertion that Clause Two of the Constitution's preamble may prevent Australia's ever discarding the monarchy. It is part of a statute of the British Parliament, which having forsworn under the Australia Act of 1986 any further meddling in Australian affairs, so cannot amend Clause Two, which appoints the British monarch our head of state. But where there is a will there is a way, and I fear Australians may develop a growing will to put aside this admirable remnant of their past.

Whether one accepts this possibility or vigorously denies it, however, the time has come to examine our Constitution without piety or unsceptical assumption. It is the main instrument by which we will determine what follows the monarchy, if we are deprived of it. It is our main defence against those who misguide us into thinking that continuity will be guaranteed if we simply change the title Governor-General to President and the title governor to, well, governor – or discard governors entirely.

I come to this subject with certain biases, having lived for nearly half the past 30 years in the United States and had close American associations for much of the rest of the time.

Shortly after returning here in 1989, after a decade in the United States, I had a lengthy conversation with the present prime minister. It was much more cordial than prickly, but the few prickly bits seemed to occur when I said or implied, "But can the government really do that?"

At the end, Mr Keating mildly upbraided me for having suffered an American brainwashing and said, "People expect more of government in Australia than they do in America."

My unspoken thoughts were: "Well, they're mugs if they do," and "I'll bet they don't." My conclusion, after four years' observation and contemplation, is that unspoken thought number two is closer to being the right one.

Australians seem no keener than Americans to accept the interventions governments seek incessantly to thrust upon them. Americans simply are more practised at rebuffing governments, and have more efficient and accessible means of doing so. Their main instrument of defence is the first ten amendments to their Constitution, which have come to be called the Bill of Rights. The Bill has helped them achieve a much higher level of independence and self-reliance than we have done, with little if any greater systemic loss of order – despite what you sometimes see on television.

The American Constitution differs importantly from ours in that it draws its authority directly from – as its preamble states – "We, the People." Ours takes its authority from the established authority of the throne. According to an intriguing popular contemporary theory, the American constitution also recognises an essential duality in democracy.

In a recent book from the Harvard University Press, Bruce Ackerman claims the concept of duality as the United States's most original contribution to political thinking. He writes: "Above all else, a dualist Constitution seeks to distinguish between two different decisions that may be made in a democracy.

"The first is a decision by the people; the second by their government."

By creating a dualist Constitution, the Americans, according to Ackerman, sought "a solution to the problem of self-definition posed by the struggle between two great Western traditions." The first tradition, derived from the Greeks, asserts that the life of political involvement serves "as the noblest ideal for humankind". The second tradition reflects Christianity's suspicion of secular perfection, and holds that the salvation of souls is a private matter and that "the secular state's coercive authority" represents, in fact, the greatest threat to the highest human values.

According to Ackerman, the Constitution makes Americans neither "perfectly public systems, nor perfectly private persons". Its framers, in recognising the continuous struggle for ascendancy "in Western thought and practice, does not seek an easy victory of one part of ourselves at the cost of the other". Instead, the Constitution proposes using the conflict to provide creative energy.

Dualist democracy provides for decisions to be made daily by government, only rarely by the people. The people, says Ackerman, have neither the capacity nor interest to engage in the town meeting, participatory democracy about which Ross Perot chattered recently. They have better things to do.

However, decisions made by the people have the "higher legitimacy," in Ackerman's phrase. It was as a consequence of decisions by the people that the Bill of Rights was added to the Constitution. Two major re-interpretations of the Constitution were accomplished by decisions of the people-one after the Civil War and the other in the wake of the New Deal.

From a pedantic view, the abolition of slavery in America was unconstitutional, since the 18th century Constitution did not ban it, and the South was coerced by the North after the War into accepting laws which many opposed. However, by a succession of actions at the ballot box, the people exercised their right to change their minds, and ultimately imposed the higher legitimacy of their authority by ratifying appropriate amendments.

On the other occasion of broad intervention, having perceived a failure by the market to work in the interests of human wellbeing, the people acted to provide constitutional underpinnings for Roosevelt's social and economic quasi-revolution.

Ackerman argues that a dualist Constitution enables the people to assert themselves at crucial moments to reorganise society so it may better deal with changed circumstances. He adds drily that a dualist constitution "prevents elected politicians from exaggerating their own authority."

Not everybody will accept Ackerman's assessment of the nature of American society. His analysis is worthy of respectful consideration, and in its light the absence of a dualist approach may be thought a distinct weakness of the Australian constitution. The American document was derived from ideas about individual liberty already enjoying considerable currency in the separate American colonies – which, it should not be forgotten, enjoyed some 200 years of history before the advent of the United States.

The Australian document was, essentially, adapted from a single established model of government, the Westminister system, with some structural guidance from elsewhere.

I like this description by Martyn Webb, emeritus professor of geography at the University of Western Australia: "The Westminster system, born as it was out of the absolute monarchies of the middle ages, acts like a cuckoo in the nest of democracy. It cannot rest until it has, by some means or another, managed to secure complete and absolute control. The Westminster system was never designed to achieve a democratic society. Instead, its objective was to create through the device of the monarch in parliament, a means by which the royal prerogatives could be exercised by a sovereign parliament free from direct interference by either the monarch or the people."

It is also worth recalling Jim Spigelman's remark that Westminister is among the most secretive of systems.

Martyn Webb is the co-editor with Patrick O'Brien, a senior lecturer in politics at the University of Western Australia, of an important book called The Executive State. It is a study of WA Inc in the context of the Westminister system's coming drastically to grief, and our constitution's lacking the resources to put Humpty together again.

O'Brien and Webb make the point that the effective banishment of the Crown by the passing of the Australia Act left royal prerogatives – residual though they may be – lying about like a box of priceless jewels, without a recognised owner. Brian Burke was the first politician to fall for this glittering temptation in a big way.

Of course, we do not have to think deeply to remember others who flirted with temptation – some even before the passage of the Australia Act.

Sir John Kerr dismissed a government on suspicion that it planned to house-keep with money it was not authorised to spend, a classically kingly sin. The same government also skirted the edge of constitutionality in procedures both followed and omitted to follow, when it attempted to borrow large sums of money to finance unannounced political programs.

In Queensland, Victoria and South Australia in recent times the executive seized public funds to go into business in its own right, demonstrating a high-handedness and incompetence that was hardly less than royal.

But in Western Australia, Burke and his retinue went further towards usurping royal prerogatives than anybody else has so far dared. The king being constitutionally dead, or all but, it was a case in Western Australia of Long live the counterfeit king. Because of the long-running Royal Commission – royal in misnomer only, since it is really responsible to the premier – Burke's is a fairly well documented usurpation.

It is clear that even if his government had been supremely capable, and all the material outcomes of its regime beneficial, WA Inc would have been a constitutional disaster. Moreover, I doubt that such a threat to democratic order could arise in this way in any country with a democratically elected government other than Australia, not to mention one with a sophisticated federal structure.

Under the American constitution, Burke would have been checked by any number of defensive devices before he got into his stride. Had he slipped through the outer protective perimeter the doctrine of separation of powers would certainly have seen him impeached. The same fate might well have befallen Gough Whitlam, Joh Bjelke Petersen, John Cain and John Bannon – to name but a few members of executive government who have grossly exceeded the authority we intended to depute to them.

Non-Americans often speak in awe – and/or derision – of the enormous power of the American presidency. Many are astonished by the idea of one man being allowed to choose (if not actually appoint) all members of cabinet, none of them elected. Most of the astonishable do not even take into account that the President could choose almost the entire public service if he felt like it, and doesn't have to have a cabinet if he doesn't want one.

But seeing him apparently able to do so much without the help of parliament and caucus fills many outsiders with wonder. Consider, though, O'Brien's assessment of the authority of Brian Burke in his days of pomp, in relation to those of George Bush and his predecessors: "If an American president had the powers, de facto or otherwise, of an Australian premier, he would be able to stack the courts, not having to concern himself with gaining senatorial approval for his nominees. Nor would he have to concern himself with gaining senatorial approval for other...executive commissariat or agency appointments.

"If Congress was frustrating him/her or junior congressmen (that is, backbenchers) giving trouble...he/she could prorogue Congress or call an election at a time most suitable for his own and his party's re-election. And probably most significant of all the powers in modern government, he would be assured of his budget's passage through Congress.

"The thought of such powers being vested in their chief executive would horrify most Americans."

Recalling that Premier Carmel Lawrence instructed the governor to prorogue the West Australian parliament, in order to frustrate two parliamentary inquiries, O'Brien sardonically notes that this was an offence for which King Charles was executed.

No doubt the O'Brien/Webb scenario regarding WA Inc will appear to some to have overtones of High Noon and The Terminator. There may be an inclination, also, to blame this assault on parliamentary democracy by recent West Australian administrations on the feebleness and failure of the Opposition and the media.

But it would be risky and unwise to exclude from consideration the contribution to pervert government of a flawed constitution. An Australian premier has many ways of subduing opposition and media without breaking the law or breaching the constitution.

Tony Fitzgerald listed some principal ones in his report on Queensland's misgovernment. A premier can reduce parliamentary sitting times, which both Bjelke-Petersen and Burke did. (So, incidentally has the present federal government). He and his ministers can persistently refuse to answer parliamentary questions. Paul Keating recently, with perfect accuracy, noted in the federal parliament that Question Time was a courtesy granted to legislators by the executive.

The executive can stack the public service politically. The West Australian government went further than probably anybody else has dared in this respect, and with even worse consequences than Fitzgerald may have envisaged – because it depends what you mean by "politically." In the vast wallow that WA Inc created it is likely that many of the "political" appointees had no intention whatsoever of engaging in the cooperative power-sharing and striving for the common good that "politics" implies.

O'Brien documented some 300 outside appointments to the West Australian public service between 1983 and 1986. Many if not most were made through what was called the Policy Secretariat – in effect, the inner circle of the Department of the Premier and Cabinet, or the

monarch and his court, to put it another way. Premier Burke claimed (or confessed, I guess, his circumstances having changed) that he personally vetted most of these appointments. The invaders crammed in especially large numbers into the Treasury, from which senior professionals were moved sideways within the public service and sometimes given little or nothing to do.

But the West Australian executive was at its most kingly in creating new agencies, or remaking existing ones beyond all recognition. WADC, EXIM, SGIC, WAGH, SSB, SECWA, Goldcorp were among these power bases. FUNDSCORP was another. That sounds particularly valuable. When WA Inc, the Musical, comes along it must surely include The Acronym Rag.

Most of these agencies were situated beyond the control of theoretically responsible ministers. The monarchic executive managed to exclude even the auditor general from any study of the activities of some.

By courtesy of the "Royal" commission we have been afforded some glimpses of how Western Australia's de facto monarch and members of his royal court divided up the State's money and privileges among themselves. In all probability Burke's court was no more raffish, sleazy and packed with self-seekers than your average royal court over the course of history. But they were better-organised for looting – and repression where needed – than at least their British royal predecessors over the past 500 years. That is because the West Australian court was effectively free of the checks and balances imposed by the ceaseless struggle for the upper hand between crown and parliament within the Westminster system.

Some members of the West Australian Court have fallen on hard times because of their own business incompetence or through application of the blind justice of the New York Stock Exchange. A handful seem likely to suffer punishment as criminals for absentmindedly abandoning aristocratic privilege and reverting to variations on the commoner's practice of exchanging bank notes in brown paper bags.

But one sees little prospect of anybody's being punished for subversion of the sort of government we have chosen, and thought we had ensured ourselves of getting. In any case, punishing subversion seldom does much good. The trick is to stop it.

It may be argued that WA Inc was an aberration and that, forewarned, political parties, the law and the media will stop it from happening again. But that is taking an unnecessary gambler's risk with our future. It is within our power to strengthen our constitutional defences against the threat of usurpations by counterfeit kings.

Whether we wish to separate legislature and executive as sharply as the Americans have done is a subject too large for my present endeavour. But I do suggest that we would benefit from adding specific guarantees of individual liberty to our constitution, although this is not entirely to discount Geoffrey Sawer's argument that the freedom of Australians to conduct themselves as they choose within the law is, in effect, guaranteed by the absence of formal restrictions on their doing so.

It is true that Australians don't risk the torture chamber or firing squad for speaking their minds or deriding the boss class. But I think we have been nudged by the tireless persistence of our leaders and officials into taking a more docile attitude to authority than is natural or productive for us, or accepted by our contemporaries in numerous other countries. In some respects, we are natural marks for counterfeit kings.

A Bill of Rights would be of double value in emboldening us as individuals to become more fully the masters of our fate, and in defining the limits of governmental authority. It would add to our constitution the elements of dynamism and democratic authority which Ackerman perceives to emanate from the dualistic American constitution.

Whether we would need to consider all ten of the American amendments in the process of writing our own Bill of Rights is also a matter for large debate. Indeed, I feel entirely unqualified to make a detailed proposal for a Bill of Rights.

I believe, however, that we would come close to achieving one that suited us by addressing three principal areas – those of freedom of speech, property rights and equal treatment by government of all citizens. We might also benefit from being more explicit in our existing constitutional provision for freedom of religious practice. We might not then fall into the American trap of seeming to espouse freedom from religion, or the present Australian one of manufacturing episodes of sectarian suzerainty, as recently occurred at Coronation Hill.

My professional experience gives me, I suppose, some modest expertise in the area of freedom of speech.

The American First Amendment places a profound and often misunderstood responsibility on government. The relevant passage from it reads: Congress shall make no law..abridging freedom of speech, or of the press.

This does not mean simply that Americans can speak their minds without fear of retribution or that journalists can write whatever they like within the law. Australians can do that without a Bill of Rights. It is a kind of clan myth that Australian journalists are more restricted by law and regulation than their American counterparts, or that Australian reporters with the intelligence, will and energy of Woodward and Bernstein could not achieve investigative coups like Watergate.

American libel law provisions in respect of public persons would be welcome. They might prevent our politicians and officials from hiding wrongdoing behind a screen of writs, often launched at public expense. But Australian journalists can mostly do what they are supposed to do.

However, true, constitutionally upheld freedom of speech and of the press obliges politicians and officials to inform the people about the actions of government. Anybody is entitled to ask and everybody on the public payroll is supposed to answer.

In the United States this has become a core element of national culture. Certainly one hears frequently of cover-up scandals. Not all officials actually enjoy revealing what they are up to. But a cover-up scandal in the United States is routine procedure in Westminister-secretive Australia.

Let us consider a few of the practices and institutions that would come under question if we had a Bill of Rights with a clause genuinely equivalent to the First Amendment.

We have come to accept that all statements about executive action by government should come from ministers, with public servants holding their tongues. It would probably be unconstitutional to silence the public servants under a constitution guaranteeing freedom of speech and of the press.

No longer could politicians blame "departmental oversight" for their own mismanagement or dishonesty. No minister would dare say, as Kim Beazley did recently, that ministers would get nothing else done if they read everything that went out under their signature. They would have to guard their signature as a precious public possession.

Telling untruths to the public, including via the media, would become a very serious offence for an official. Governmental information services, paid for with public money, would come under scrutiny. If judged propagandistic rather than informative they would probably be unconstitutional.

It would be none of the government's business who owned newspapers or publishing houses or, probably, TV stations. The notion of a government's banning TV commercials or ordering up quotas of certain kinds of program would be thought preposterous.

Any law enabling British publishers to obstruct the import of American books would be judged a total thigh-slapper. The ABC might well turn out to be unconstitutional.

I could go on at some length on these lines. Suffice to conclude, however, by suggesting that it would be wrong to consider our Constitution as something immutable, or to turn our eyes away from any potential exemplar in our constant efforts to perfect it.

Chapter Five

Financial Centralisation: The Lion in the Path

David Chessell

In his musings about his past life, Ulysses says "I am a part of all that I have met". We are all, to a considerable extent, fashioned by our experiences – the people and situations we have encountered along life's path. And so too has been the constitution. It will be my contention this morning that "I am a part of all that I have met" is more true of the document that we have come here today to discuss than it is of all those assembled here to discuss it.

In one sense the constitution is remarkably little altered all these years since its conception. If Barton, or Parkes, Deakin or Samuel Griffith were here present, and we showed him a copy of the document, he would probably be surprised that so much of the document he was engaged in drafting so many years ago is still extant, seemingly resilient to the mighty changes wrought by the twentieth century. But to stop this hypothetical inquiry there would be just too trite.

It is hard to imagine that the Founding Fathers would have been content merely to see the document they devised. Surely, if they were here present, they would want to know how the Australian Federation in the last decade of its first century had worked out in practice. They surely would like to know how their vision of the distribution of powers among their beloved Commonwealth and their beloved States – for they saw no conflict in faithfully serving both – had been translated into reality as it met the rapid succession of social, technological, economic and political challenges of each passing decade.

How close in practice has the Australian constitution come to obtaining the optimal balance between unity and diversity?

Comparing the first and last decades of this century, the centralisation of power at the Commonwealth level is the most astonishing change to the constitutional compact originally entered into by the States. I shall be focusing on the power to tax and to spend, which is not to diminish the importance of other changes, such as the interpretation and exploitation by the Commonwealth of the external affairs power.

The accretion of power at the Commonwealth level has been assisted by those few changes to the constitution that have been approved by the requisite majorities. As early as 1910 the Commonwealth's powers to "take over from the States their public debts existing at the establishment of the Commonwealth" was broadened – infinitely – in terms of the quantity of States' debt that could be taken over by deleting the words "as existing at the establishment of the Commonwealth".

This provision – section 105 – was further dramatically tilted in favour of the Commonwealth by the 1929 amendment, made in the wake of the financial panic which presaged the Great Depression. The powers of the Commonwealth were extended to enable the Commonwealth to make agreements with the States on every aspect of State debt: the taking over of debt, the management of debt, the payment of interest, the provision and management of sinking funds, the consolidation, renewal and redemption of State debts, the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth, even the entering into of new debt by the States.

While the new Section 105A only empowered the Parliament to make agreements with the States about their debts, the fact was that an agreement – the Financial Agreement of 1927 – already existed. The 1929 amendment removed doubt about the constitutional validity of the Loan Council's absolute control over State Government debt and, from 1936, the Loan Council extended its authority to the annual borrowing programs of semi-government and local authorities.

A man who surrenders his right to borrow to another party and receives assistance from that other party in servicing and repaying his existing debt, in effect surrenders his financial sovereignty to that other party. The Financial Agreement was a remarkable abrogation of responsibility by the States. The Financial Agreement was like a neon sign flashing the message to financial markets in Australia and overseas "We States can't be trusted to manage our own affairs".

Outstanding debt at any point in time, in effect, represents the cumulative outcome of spending and revenue decisions taken in the past. The Financial Agreement muddied the waters about responsibility for those decisions. State governments were no longer clearly accountable for their actions. The Commonwealth – to be precise, the Commonwealth Treasury – was thrust into the role of gendarme of the federal financial system – with the task of ensuring, as well as it could, that State debt - and hence State expenditure and revenue decisions - was managed prudently.

The States had put their feet firmly on the sticky paper laid for them by the Commonwealth – Commonwealth assistance in return for Commonwealth control. Once the States had ventured onto the sticky paper, there has been no turning back.

Amendments have been made to two of the Section 51 powers to extend the power of the Commonwealth – the social security power, which was inserted in 1946, and the 1967 amendment that removed the limitation on the power of the Commonwealth to make special laws in respect of aboriginals in any State. The latter is to be the subject of an entire section of this conference tomorrow, so I shan't trespass on that territory.

Under the constitution as originally drafted, the Parliament was empowered to make laws in respect of invalid and old-age pensioners. In 1946 this power was extended to include "The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances".

This amendment led to a significant expansion in what are now two of Canberra's largest bureaucracies – the Departments of Social Security and Health, although it should be noted that even the Department of Health predated by a quarter of a century the 1946 amendment.

A surprise, for me at least in preparing this paper, was that it was this head of power - the social security power – that spawned the Commonwealth Office of Education. This Office was brought under the wing of the Prime Minister's Department between 1952 and 1966, at which time a separate Department of Education and Science was established.

As Dr Evatt triumphantly put it to the House in December 1953 – I might say this remark was in the debate in which Evatt was supporting Menzies' 1953 States Grants (University) Bill – "The Commonwealth is marching into the field of education, in which for many years the States had the primary responsibility".

By no means was Evatt's view universally accepted. As late as 1971, none other than the Minister for Education and Science himself, in an address to South Australian teachers, posed the question "Where does the responsibility for educating this ever increasing number of pupils lie?" He answered his own question as follows:

"So far as the taxpayer is concerned, Australia is a Federation under which certain powers have been given to the Federal Government and the remainder have been left with the State

governments. The responsibility for education was a power exercised by the States ever since they took over responsible government in Australia and a power which they retained after Federation. The Commonwealth has no constitutional power in this field ".1

Thirteen years earlier, in 1958, Gordon Bryant - the then representative of the electorate of Wills – in effect recognised the force of David Fairbairn's just quoted remark when he lamented in the House "I realise that the Constitution mentions education not at all" but he went on to postulate "if I had to choose between the Constitution and the children I would support the needs of the children. The dead hand of the 'nineties should no longer be allowed to strangle the education systems of this country". The then Prime Minister joined issue as follows:

"I should like to say to the honourable member that I rather envy the easy way in which he sets the Constitution on one side on the ground that it is out of date. The fact is that it still exists. The fact is that education, except in Commonwealth territories, remains a function of the States ... Therefore we are dealing with a problem in which the Commonwealth does not have power over, or responsibility for education in the States or by the States."

In the same debate Dr Evatt argued "The whole purpose of the constitutional amendment [the 1946 social services power] was to give this Parliament power ... to make educational grants ... it is not, therefore, a question of divided legislative power and responsibility; direct power and responsibility reside in this Parliament".

In the event, Evatt's argument, married with Bryant's emotion and Fairbairn's ever increasing number of children, eventually won the day, so that by the end of 1971, in answer to a question in the House, the then Minister for Education and Science, Malcolm Fraser, cited the Scholarships Act 1969 and the Education Act 1945-46 as legislation enacted by the Commonwealth under the Section 51 (xxiiiA) benefits to students power. The Minister also responded to the question "Why has this power not been used to remedy the lack of educational opportunity throughout Australia" by chronicling the more than seven-fold increase in spending under this head of power over the decade to 1970-71 and the 13.3% increase in prospect in the following year.

So, such constitutional changes as have occurred, have enhanced the power of the Commonwealth; none have enhanced the power of the States.

High Court interpretations have also enhanced the power of the Commonwealth. There are plenty of others more expert than I who are able to comment on the legal issues involved. I will confine myself to three areas in the financial sphere that have proven to be very significant:

first, the High Court's restrictive view of the power of the States to levy excises or consumption taxes on goods in view of the granting of exclusive power to impose customs, excise and bounties to the Commonwealth under Section 90.

That is, the High Court has consistently regarded all taxes on goods, including the consumption of goods, as excise duties. This has not prevented the High Court from countenancing State franchise taxes on tobacco, liquor and petroleum on the grounds that they involve a charge for a licence or permit required to engage in trade in these products (subject to Section 92), rather than a charge on current production or sale;

second, the High Court's expansive view of the Commonwealth's power under Section 96 to influence State policy by granting financial assistance to the States on terms and conditions set by the Commonwealth. According to Else-Mitchell

"The development of a Commonwealth... grants policy in Australia was not possible until the High Court had clarified some aspects of the appropriation power (Section 81) and the nature and extent of the power to grant financial assistance to a State (Section 96). The Founders and early commentators of the constitution held differing views on major aspects of these powers and the relevance to them of the requirements in the constitution that taxes should not discriminate

between States and that laws of trade, commerce or revenue should not give preference to any one State over another".

It was not until 1923 that the Commonwealth government took the first major step towards exploiting the grants power by passing two legislative measures authorising conditional grants to the States – the Main Roads Development Act and the Advance to Settlers Act. Ironically, given his crucial later pronouncements in favour of the Commonwealth in his role as Chief Justice, Latham argued in the House against the latter – the Advance to Settlers Act – on the grounds that if the mere voting of money is to bring a matter within the jurisdiction of the Commonwealth, then the Commonwealth could obtain control of any matter simply by a liberal grant of money. He argued that grants should only be made if the State required assistance.

In the event, it was the Federal Aid Roads Act of 1926 that was challenged by three States in the High Court on the ground, inter alia, that the Act related to road-making, a matter which fell within the powers of the States, and was not, in substance, a grant of financial assistance. In a decision, remarkable for its brevity, especially considering its importance, the High Court pronounced the following judgement:

"The Court is of the opinion that the Federal Aid Roads Act No. 46 of 1926 is a valid enactment. It is plainly warranted by the provisions of section 96 of the constitution, and not affected by those of section 99 or any other provisions of the constitution, so that exposition is unnecessary."

the third major High Court decision in favour of the Commonwealth was the decision to uphold the legislation granting the Commonwealth a monopoly over the income tax base. The legitimacy of the takeover of this last remnant of the States' fiscal independence rested on the High Court's interpretation of the grants power. Under the uniform tax plan, the Commonwealth levied an income tax at a uniform rate throughout Australia and reimbursed the States by grants under Section 96 of the Constitution of the sums they would have collected from their own State income taxes but on condition that they levied no such taxes themselves.

Another factor which has tilted power toward the Commonwealth has been a compositional factor. There could be an accretion of power at the Commonwealth level, even in the absence of constitutional amendment or legal interpretation favouring the Commonwealth, simply because the powers reserved to the Commonwealth have become more important for whatever reason over time. This is, in fact, pretty much what has happened: international trade, taxation, "postal, telegraphic, telephonic, and other like services", banking, naturalisation, immigration, foreign ownership, divorce, invalid and old age pensions, defence, conciliation and arbitration of industrial disputes extending beyond the limits of any one State are all areas I would judge that have been growth areas for the public sector. They are all areas expressly reserved to the Commonwealth. Indeed, looking down the Section 51 powers, the only real "loser" given to the Commonwealth was the power over lighthouses, lightships, beacons and buoys.

Unfortunately for us taxpayers, the Commonwealth didn't have all the luck! The two single largest areas of State expenditure – health and education – also have been growth areas. Shorn of their income tax base and denied access to any other broad based tax, the States have only been able to meet the massive increase in demand for education and health services and to fund the inefficiency that has been part and parcel of the public provision of these services by advancing further onto the sticky paper of financial dependence on the Commonwealth.

At present the Commonwealth is responsible for the collection of 70% of total public sector revenues, whereas its own outlays account for only about 50% of total public sector spending. This situation - known as vertical fiscal imbalance - required the Commonwealth to make available to the States total gross payments estimated to be $29.7 billion in 1991-92 or 30% of Commonwealth outlays. No less than 42% of State revenue is in the form of payments from the Commonwealth.

Of course, this avalanche of dollars doesn't all come with no strings attached, although $14.2 billion is made available to the States in the form of general revenue assistance to spend according to each State's expenditure priorities. The remaining $15.3 billion – or 52% – of payments to the States and Territories in 1991-92 are specific purpose payments – the payments are for purposes designated by the Commonwealth and/or as a condition of the States agreeing to provide particular services or undertake particular projects. The proportion of total Commonwealth payments in the form of specific purpose payments has exactly doubled since 1972-73 – from 26% to 52%. In all, the Commonwealth Treasury has been able to identify 90 different specific purpose payment programs in 1991-92, the vast majority of which are for spending in areas of State responsibility.

A few major programs account for the bulk of this assistance – payments for education, health, housing, roads and financial assistance for local government account for about 88% of total specific purpose payments.

Of this $15.3 billion of specific purpose payments, $5.6 billion is in the form of specific purpose payments through the States – the States are simply the postboxes used to achieve Commonwealth objectives. These include payments for higher education, non-government schools, and general purpose assistance to local government.

The terms and conditions that attach to the remaining $10 billion or so are the result of negotiations between the Commonwealth and the States. The amount of Commonwealth influence on the determination of State expenditure priorities varies from payment to payment.

The upshot of these arrangements is a set of Commonwealth-State financial relations that have diminished the stature of the States to the point where they are virtually unrecognisable from those that existed in the first decade of the century. It is a system which involves great duplication of functions and excessive bureaucracy. It is little wonder that Australians regard themselves as being over-governed.

Our system rewards politicians and public servants at both levels of government that are best able to play the federal game – a game that calls for tacticians, skilled at fighting a kind of inter-regional war. At the Commonwealth level the easiest saving to make from the budget is to cut payments to the States. Indeed, the slide into deficit in the Commonwealth budget would be far worse but for this very process.

From the State perspective, the temptation of accepting Commonwealth payments and surrendering State sovereignty has proven to be irresistible. The attitude of all State governments – but only openly and honestly given voice to by a former long-serving Queensland Premier – is that the only good tax is a Commonwealth tax.

Our system of inter-governmental financial relations has been the subject of numerous inquiries by personages and bodies with varying degrees of authority, right up to the Prime Minister of the day. None have managed to produce a blue-print for reform that has looked even remotely like being adopted. Instead, it is possible to trace the evolution of the institutions and forms of Commonwealth-State financial relations in terms of a series of ad hoc responses to a series of events, developments and crises. Ulysses may have been a part of all that he had met, but our federal financial system is a total reflection of all that it has met – and it mixes in the wrong circles. Our federal financial system reflects the lowest common denominator in State and Federal politics.

Our inter-governmental arrangements are potentially an instrument for achieving better government; for playing a role in fashioning events, rather than being wholly fashioned by events. But what purpose should our constitutional arrangements be designed to achieve? 'Tis at this point, finally, that we come upon the Lion in the Path.

This phrase was uttered by James Service, a former Premier of Victoria and a strong and important Federalist. At a Federal conference in Melbourne in 1890 he said:

"The first question and probably the most difficult is that of a common fiscal policy .. I have no hesitation in saying that this is to me the lion in the path; and I go further and say that the Conference must either kill that lion or the lion will kill it ... To my mind a national government without a uniform fiscal policy is a downright absurdity." 2

The term fiscal policy has assumed a different meaning since 1890, when it referred to the contentious issue of the uniform external tariff and the abolition of inter-State tariffs. Strangely enough, James Service's remark is just as apposite to fiscal policy as it is commonly understood today as it was to its nineteenth century meaning, since most people agree that national economic management is properly the exclusive preserve of the Commonwealth.

Why do people think this way? The explanation – and one I find persuasive – preferred by the Canadian constitutional scholar Anthony Scott3 is that it would be technically feasible to co-ordinate State government spending to achieve any desired fiscal policy outcome at the national level. Such coordination is not impossible. It would simply be so time-consuming and so draining of the energy of the nine governments involved that it is not seriously advocated. If Australia tried to take that route it would be the transactions costs – the negotiation and organisation costs – that would stand in the path and make our Federation an absurdity. The negotiation and co-ordination costs would be greater than the government- organisation costs involved in trying to settle on a national fiscal policy at the Commonwealth level.

This approach can be applied to all the functions that have to be assigned to one or other level of government. The Founding Fathers chose to make communications a Commonwealth power. It would, however, be technically feasible – as is done between adjoining small countries in Europe – for the States through negotiation to enter into a workable agreement on the division of the radio spectrum and sharing the number of broadcast hours of each day. Instead, Australia chose to internalise those costs – and there are costs – of agreeing on and administering a national communications policy.

An example in the other direction is railways. Canada chose to internalise the administrative costs by assigning railways to the national Government. Australia went the other way but, with the establishment of the National Rail Corporation, has recently gone through the negotiation process of having a more closely co-ordinated system for inter-state freight than has been the case hitherto.

Generally speaking, organisational costs increase, the greater the interjurisdictional spillovers – where the costs or benefits of the provision of goods and services in one jurisdiction spill over into other jurisdictions. Generally speaking, section 51 powers are those where there are significant spillover benefits. The Founding Fathers appear to have allocated functions to the Commonwealth or the States as if they were trying, at the time, to minimise the total organisation, administration, co-ordination, signalling and mobility costs of various assignments of functions.

I urge you not to be side-tracked by arguments about centralisation versus decentralisation per se, or debate about great principles (or the lack of them) to guide constitutional change. Rather, I urge you to consider the minimisation of organisation costs as the yardstick by which to measure proposals for constitutional change.

Endnotes:

1 Quoted in I K F Birch, "Constitutional Responsibility for Education in Australia", Australian National University Press, Canberra, 1975, p ix. Original sources for the quotes from the Parliamentary Debates regarding the constitutional status of education cited in the text may also be found in this work.

2 Quoted in Sir Zelman Cowen, "Is It Not Time?", Quadrant, June 1991, p 21.
3 See A Scott, "An Economic Approach to the Federal Structure", Centre for Research on Federal Financial Relations, Australian National University, reprint Series. No.27.

Chapter Six

The High Court - The Centralist Tendency

L J M Cooray

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1. The Federal System

Each State and the Commonwealth have their own Constitutions. The State (former Colonial) Parliaments predated the Commonwealth Parliament. An examination of the Constitutions of the States demonstrates that each State Parliament is given power to legislate in general terms for the benefit of the State without limitations of power in the authorising provisions. Limitations of power did exist on the Colonial Parliaments when they were established. These limitations which derived from Acts of the United Kingdom Parliament and British constitutional law have, in modern times, been removed. The Commonwealth Constitution came into effect in 1901. The Constitution established and empowered the Commonwealth Parliament. The Constitution recognised the existence of the then Colonial Constitutions and Parliaments, which thereafter were to be called States and State Parliaments. The Constitution contained limitations on the power of State Parliaments and Government.

The Commonwealth Constitution does not provide a general grant of power to the Commonwealth Parliament (unlike the State Parliaments). The power of the Commonwealth Parliament is specifically defined. There are also certain prohibited areas of legislation.

Therefore, the scheme of the Commonwealth Constitution is that every Act of Parliament must fall within the words of a head of power in the Constitution and must not offend a constitutional prohibition. The power of State Parliaments, originating from a general grant, are into any area which is not limited by the Commonwealth Constitution or by a valid Act passed by the Commonwealth Parliament.

For the sake of those present who are unfamiliar with the Constitution, I quote some provisions of the Commonwealth Constitution which illustrate (i) authorising provisions for the Commonwealth Parliament, (ii) a prohibitory provision operating on the Commonwealth Parliament, (iii) a prohibitory provision operating on both Parliaments, (iv) a prohibitory provision operating on the State Parliament and (v) regulatory provisions operating on both parliaments. (See References)

2. The Role of a Constitution

Most countries have a basic document of government called a constitution. There are constitutions in countries such as the former USSR, South Africa, China, Singapore and the Philippines and Governments in these countries profess to function in accordance with their constitutions. If a very broad definition is adopted it could be said that constitutional government prevails in these countries. But something more than the existence of a constitution is required for an effective system of constitutional government. It is therefore proposed at the outset to distinguish between constitutionalism and sham constitutionalism. The constitutional system of government exists where a constitution is supreme and regulates the exercise of power by the main organs of government with the consequence that every act of ministers and public servants

is carried out in accordance with the law and every such act is authorised by law. The emphasis should be placed on the words "authorised by law". However, when law confers wide and unfettered discretionary powers over fundamental or important matters which affect individuals or institutions, acts committed in exercise of such discretion may be legal, but can not be said to be in a meaningful sense authorised by law. The presence of judicial review and control and fair elections are other important facets of constitutionalism. The content of law is also important. This is where the traditional concept of the rule of law as adapted to the modern state by Geoffrey Walker in his book The Rule of Law is to my mind immensely important.

Australia is not a totalitarian or authoritarian system, as yet. But there is a gradual movement away from constitutionalism and the rule by law is replacing the rule of law.

The question is often asked what is the relevance of a constitution drafted in 1900 for the present? The United States Constitution was drafted 200 years ago. The mere fact that the Constitution was drafted 90 or more years ago, does not mean it is outdated.

What a constitution is concerned about is power – providing to a government defined areas of power and placing limitations on the extents of power. The areas of power and the limitations on power are equally important.

The following quotations from Montesquieu and Hayek emphasise the premise that constitutionalism is identifiable with effecting a proper relationship between liberty and the power of government, in the context of Lord Acton's oft quoted statement "power corrups and absolute power corrupts absolutely".

Constitutionalism, then, provides a kind of bridge between political processes and political ideas. It infuses the governing system with a communal attitude that both supports the basic plan and imbues it with ideological, ethical coloration.

To obtain a clearer notion of the function of constitutionalism, it is important to recall that democracy does not eliminate political realities. The power of men over men remains. Relations of dominance and submission, leadership and influences are not abolished. Democracy attempts to increase individual freedom and general participation without destroying the kind of orderly society that builds around the power of leadership. It is the contribution of constitutionalism to instil the general goals of democracy so deeply in the political habits of both rulers and ruled that behaviour inconsistent with democratic ideals can never tempt them. Effective constitutionalism provides each set of political processes with a protective coating consisting of ideas about political conduct, about governing and being governed, which are so profoundly rooted in tradition that to violate them would be unthinkable.

A perfected constitutionalism need not bar the way to innovations in policy or governmental forms. It can, however, provide a protective safety device that will ensure maintenance of broader, more permanent community goals. Constitutionalism may thus correctly be called a conserving force, discouraging impetuous change but not necessarily impeding cautious reforms ..." (Fluno)

When Montesquieu and the framers of the American Constitution articulated the conception of a limiting constitution that had grown up in England, they set a pattern which liberal constitutionalism has followed ever since. Their chief aim was to provide institutional safeguards of individual freedom; and the device in which they placed their faith was the separation of powers. In the form in which we know this division of power between the legislature, the judiciary, and the administration, it has not achieved what it was meant to achieve. Governments everywhere have obtained by constitutional means powers which those men had meant to deny them ...

Constitutionalism means limited government. But the interpretation given to the traditional formulae of constitutionalism has made it possible to reconcile these with a conception of

democracy according to which this is a form of government where the will of the majority on any particular matter is unlimited. As a result it has already been seriously suggested that constitutions are an antiquated survival which have no place in the modern conception of government. And indeed, what function is served by a constitution which makes omnipotent government possible? Is its function to be merely that governments work smoothly and efficiently, whatever their aims? (Hayek)

The Constitution merely deals with power and limitations on power. The need for limitations on power does not necessarily change from year to year or century to century. Sometimes where there are problems, change is necessary. The need for change can be over-emphasised. A constitution tends to reflect problems, conflicts and contradiction in society. It does not necessarily attempt to provide resolution of conflicts – but to create values, processes and institutions which will make possible resolution and, where resolution is not possible, compromise and co-existence. This is a basic proposition. But many critics of the Constitution proceed in ignorance of this factor. Sometimes a Constitution may reflect existing conflicts and contradictions in society. Let me provide an illustration.

The drafters of the Constitution in the 1890s debated and discussed the tensions arising from the relationship between the powers of the Senate, supply and Westminster style responsible government. They could not draft definitive sections for the Constitution because of the differing views of the delegates. What blew up in 1975 was an unresolved political problem which the drafters had agonised over, and finally incorporated in an open ended form in the Constitution. Therefore when the problem blew up in 1975 there was no clear constitutional answer. There were two conflicting conventions: a government without supply should resign; a government which had a majority in the House of Representatives had a right to govern. The Governor General sought a constitutional answer in 1975. He sought a quick resolution of the problem. There was no definite constitutional answer – the constitution and conventions provided direction – it provided a framework within which the problem could be tackled. The greatest democracy in the world (US) has a supply crisis every year (though not in the 1970's). The solution to a supply crisis is political negotiation – with unemployed public servants, disruption of welfare services and a bankrupt nation, as the sanction for politicians reaching a compromise. The Governor-General in 1975 could have pointed this out to the warring political leaders and placed the responsibility fairly and squarely on them. It was a situation which called for a political, not a legal solution. The Constitution provided values and a framework. It did not provide an answer.

Many of the critics of the Australian Constitution and those who have sought to effect change to it through devices and subterfuges which have been approved by the High Court, fail to understand the purposes of a Constitution which limit powers and provide avenues for dealing with conflicts. I make these comments about the role of a Constitution because it is the failure to understand the role of a Constitution that has led to the undermining of constitutionalism in Australia and the western world. A Constitution is not intended to provide a recipe for efficient government or for a government which can transform society along socialist or capitalist lines. These are matters within the area of government and must arise from interaction of people, government and many other factors.

3. The Role of the Judge

The traditional idea that the role of the judge is to interpret the law and the role of the legislature is to create law, has been subjected to sustained criticism. The extent of the law creating role of the judge depends on the context and circumstances. The common law in the pre-modern era during the period when the common law was being brought into existence, provided the judge a far more creative role than that which is available to the modern common law judge in England.

The High Court in a manner which I have no time to explain has, in recent years, adopted a creative (or may be destructive depending on the perspective) approach to the inherited English common law.

The role of the judge in the interpretation of Acts of Parliament may be more limited where parliament has taken pains to spell out its intentions, aims and objectives. In such a situation the role of the judge is limited to interpreting words and phrases and working out ambiguities arising from failures by parliament to clearly enunciate its will and purposes.

The role of the constitutional judge is wider than that of a judge operating in the modern common law system or interpreting an Act passed by Parliament.

The Constitution is an Act of the United Kingdom Parliament, but it is more than an Act of Parliament. In the words of Chief Justice Latham one of the effects of the Engineers case was to tie the court to the crabbed rules of English statutory interpretation. This means that the court interpreted the Constitution like another statute. It placed primary emphasis on the words of the Constitution and the words of a challenged Act.

This is literalism. Legalism is not the same as literalism. Legalism involves the employment of tried and tested methods of ascertaining the meaning of a legal document as intended by the authors. In relation to a constitution, it may involve where necessary an examination of the totality of the document and the historical context. Literalism is quite a different proposition. It means the adherence to the literal meaning of language with no regard to extra-textual considerations or broader constitutional objects.

The following judicial dicta provide a rationale for a different and broad interpretation of the Constitution.

O'Connor J stated in the Jumbunna Coal Mines case:

Where it becomes a question of construing words used in conferring a power ... on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve. For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.

Higgins J, in Attorney-General for NSW v Brewery Employees Union of NSW stated:

Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting - to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.

These two quotations (including another by Windeyer J referring to the Constitution as the birth certificate of a nation) have been frequently quoted by the judges of the High Court.

There are two possible methods of broadly interpreting the Constitution.

The first approach is one which articulates a need to change and adapt the Constitution in the context of changing circumstances. The alternative approach is that the totality of the Constitution must be examined and interpreted in its historical context taking account of the intentions of the founders, leaving changes to the people in accordance with the amending procedure provided by the Constitution.

I therefore identify three approaches to constitutional interpretation – the literal technique, the broad interpretation in the light of human needs and changing circumstances, and, the broad

interpretation in the context of the intentions of the founders. I propose to focus on these competing views.

Professor PH Lane (1988:606) writes about one High Court decision which favoured the Commonwealth thus: "We detect a judicial concern for the ubiquity of a law-controlled community, and an unease about the escape of the individual, the interstate trader, from that uniformity".

The Mason High Court has expressed a fear of putting more and more matters outside the authority of Australian parliaments.

Senator Gareth Evans argued "It is the judges rather than the people or politicians who have in practice borne the primary responsibility of adjusting the Constitution to the reality of social and economic change". Regrettably, however, this has not been good jurisprudence when the result was clearly to distort the constitutional compact.

The rationale for judges to interpret the Constitution broadly in the first sense is provided by the views of Sir Anthony Mason on the role of a judge and the High Court, in `Future Directions in Australian Law' (1987) (Monash University Law Review 149 at 157), where he states "in recent years the High Court has been less inclined to pursue formal legal reasoning so far". He cites a number of examples of his impatience with traditional legal reasoning.

Sir Anthony also argued at 158 that the courts have a responsibility "to develop the law in a way that will lead to decisions that are humane, practical and just". Such a formulation provides a slippery slope for judges. Judges will have vastly different conceptions of what is humane, practical and just.

Sir Anthony says in the same article at 158-59 that "it is unrealistic to interpret any instrument, whether it be by a constitution, a statute or a contract, by reference to words alone, without any regard to fundamental values". What are fundamental values? Fundamental values of a Marxist, a Socialist, democratic socialist, an anarchist, or objectivist, a Liberal, a Libertarian, or a traditional moralist, are different. Sir Anthony then proceeds to say that "by values I mean those that are accepted by the community rather than those personal to the judge". Sir Anthony is apparently confusing community values and fundamental values. There is, however, no indication that Sir Anthony, in his judgments on the common law and the constitution which have involved departures from existing precedent, has paid any regard to community values. How are community values to be assessed?

Sir Anthony's judgments do seem to reflect the dominant values of the academic community – are these community values? The respected and impartial organisation the Roy Morgan Value Study has found that only 4% of the Australian people favour more intervention in the lives of ordinary Australians. Yet one of the bases of Sir Anthony Mason's interpretation of the constitution is that it must be interpreted so as to provide more room for Parliaments to operate. One may ask "Where is Sir Anthony's respect for community values?"

The above words of Sir Anthony Mason demonstrate unbounded intellectual arrogance, coupled with a knowledge and understanding of democracy, constitutional law and legal processes which is myopic. This comment is equally applicable to other judges who share Sir Anthony's philosophy.

The unbounded intellectual arrogance lies in the belief of a small number of judges in the High Court (sometimes by a majority of one) that they have the duty and the obligation to re-write the constitutional document drafted by a body elected by the people consisting of persons of diverse backgrounds and philosophies, versed in politics as well as in constitutional law. Does it not enter into the minds of the High Court Judges that they are not infallible and that they may be wrong or misguided? If so, should they not desist from their belief that they should proceed with the re-writing of the Constitution?

The judges have demonstrated little understanding of democracy, the political processes in government. This is evident in the ease with which they brush aside the history and development of the Constitution, the manner in which it was drafted by a Constitutional Convention consisting of persons elected by the people and the amendment machinery in section 128. The knowledge of law demonstrated in the Murray Islands case would earn one out of ten from me if I was correcting an undergraduate essay.

Sir Anthony Mason (as Justice and Chief Justice) in decided cases as well as public speeches and writings, has expressed the importance of deferring to the authority of a Parliament elected by the people. This overlooks the dimension that the power of the Parliament is limited by the Constitution. The role of the judge is to interpret the Constitution. A judge who fails to do so is in breach of his judicial duty and has abdicated his responsibility.

As ABC broadcaster and legal commentator Richard Ackland puts it: "The founding fathers wrote the Constitution as though Australia was to be six States with one little Commonwealth government tacked on to look after customs and defence. State rights and powers were to dominate. Instead, the High Courts over the years have virtually re-written the Constitution to hand power from the States to the Commonwealth". Ackland says "the Court has brought about "The Great Centralist Dream". Since states-righters have won some rounds, it's been a two-steps-forward, half-a-step-back process, but Canberra has been the overall winner."

I do not have time to flesh out and prove this bare statement. But my writings demonstrate that the High Court has adopted an approach to construction that has led it to undermine the intentions of the Constitution's draftsmen, (see Cooray, 1979: Ch 1; Cooray, 1988:Ch 5.9; Cooray & Ratnapala, 1987).

It bears emphasis that whatever law making role the High Court has exercised in respect of the Constitution has taken place in the context of legislation enacted by the Commonwealth Parliament.

The intellectual tide which demanded more power to central government and therefore adaptation of the Constitution to changing circumstances, gradually prevailed over traditional constitutionalism and the idea that the original compact could be changed only by the people. As a consequence the Constitution has undergone a transformation which has resulted in the translocation of substantial powers from the States to the central government. This translocation was judicially executed in the context of legislative initiatives, without the approval of the people in the manner required for the alteration of the Constitution.

A less publicised fact is that almost all of the proposals submitted to the people which tended to centralise power have been rejected not only by voters in a majority of States but also by a majority of all Australian voters. If anything, the history of referenda in Australia demonstrates a popular reluctance to depart from the original constitutional settlement.

These facts point to a startling divergence between community wishes and constitutional development in Australia. The transformation took place as a consequence of the literal and "the Constitution must change in accordance with the needs and modern circumstances" approaches.

The judges who adopted a literal construction may have done so as a consequence of their common law training which provided them with no expertise to relate to written constitutions, or with a view to being apolitical and avoiding political controversy or because they saw the technique as a means of giving effect to their preferred views on centralism.

Australia has as good a Constitution as could have been drafted by imperfect human beings. Problems with the Constitution have arisen not from intrinsic drafting weaknesses, but as a consequence of its interpretation by the High Court which has, in the context of legislative initiatives, presided over a substantial relocation of power from the States to the Commonwealth.

This is contrary both to the intentions of the drafters and to the wishes of the people as expressed in successive referendums.

Another dimension in constitutional interpretation is the federal balance (a concept to which I will return). Some judges have been conscious of the need to maintain a federal balance – others have been unconscious of or to varying degrees hostile to the idea of a federal balance.

Traditional Constitutionalism Versus Needs Oriented Change Approaches

According to traditional legal theory the task of a Court vested with constitutional jurisdiction is to apply, interpret and uphold the Constitution. In the words of Quick and Garran, "where a community is founded on a political compact it is only fair and reasonable that that compact should be protected, not only against the designs of those who wish to disturb it by introducing revolutionary projects, but also against the risk of thoughtless tinkering and theoretical experiments". Accordingly the function of changing the Constitution is not vested in the courts but in a separate constitutionally designed body (the people) acting according to a prescribed procedure.

The Constitution undoubtedly reflects the values of its founders. There is a case for altering a constitution when values change. But this is simpler said than done. How are present community values to be determined? Is a transient and bare majority in the Commonweaith Parliament or the High Court itself competent to decide these issues for the community? The referendum statistics referred to are relevant in this context. However a more important issue arises.

This issue involves the consideration of the very meaning of a constitution. Should a constitution be something which is pliant to momentary pressures or should it represent a longer term compact insulated from the vicissitudes of majoritarian impulses? Can a constitution in a meaningful sense be operated on the principles of supremacy of Parliament alone? Any discerning observer of the English constitution will concede that there is a great deal more to it than the supremacy of Parliament which in effect reflects the policies of the government of the day, enjoying the confidence of 51% of the Parliament. On many legislative issues before Parliament it may enjoy much less popular support in the community outside. In a society such as Australia where there is pronounced diversity of interests (regional, economic, ethnic, etc.) the need for constitutional certainty is even greater. In such a society the terms of association have greater claim to observance. But we need not go so far. History is quite clear that there are no inevitable trends in social perceptions. Marx, in this respect has been proved hopelessly wrong. What is popular social policy today can be despised tomorrow. A constitution that is pliant to short term currents of majority opinion cannot serve its purpose. It cannot protect minorities or individuals. It will be a manipulatable and vulnerable statute which will sooner or later fall prey to demagogues or dictators.

A common argument advanced against relying on the intentions of the founders is that the original intentions of the founders of the Constitution are themselves uncertain. Therefore it is argued that it is unhelpful to ask judges to attempt to give effect to such intentions and to leave any change to the amending procedure. Doubts on the intentions regarding specific provisions are always likely to occur. But the broader objects of the founders are sufficiently clear from the history of the federation and the text of the Constitution. The principal submission is that in the construction of specific provisions, it is unwarranted to adopt interpretations which are clearly inconsistent with the broad objects of the founders. It is argued that the framers of the Constitution included Isaacs, Higgins, Griffith, Barton and O'Connor and that the first two held a rather different view of the federal balance than the latter three. This is undoubtedly correct. However, is it not important to ask the question whether the Colonies would have ever agreed to federate on terms such as those which are reflected in many of the High Court judgments? Would they have federated on the terms they agreed to if they anticipated the interpretations in

successive High Court decisions culminating in the Franklin Dam case? If the answers are most likely in the negative, should not any change be left to the amending procedure? My thesis is not that each constitutional question involving doubt should be resolved by the referendum method. The submission on the contrary is that certain decisions of the High Court have defeated the broad intentions of the founders ascertainable by recourse to the principles of construction developed within our legal tradition in relation to the interpretation of constitutions. A doubt regarding the intentions of the founders may justify an interpretation by the High Court. But in order to justify the withholding of a question from the people, the doubt must be reasonable.

It is often contended that where doubts have arisen as regards specific provisions the intentions of the draftsmen as stated in the Convention Debates do not provide any guidance. It is true that the Convention Debates do not provide guidance on specific provisions. But the Convention Debates and the entire national debate which surrounded the drafting provide ample evidence of the view of federation that the Constitution was intended to incorporate. The High Court in interpreting such provisions has often failed to give due weight to the fact that the Australian Commonwealth is a federation and not a union. There is nothing more clear from the Conventions than the fact that the founders intended the States to retain a degree of independence of action. The precise limits of this independence are open to argument but not the fact that a degree of independence was intended. The approach of the majority of the High Court to the interpretation of the Constitution has taken minimal account of the implications of federation.

The federal balance concept is one which emanates from the text of the Constitution. It is specifically declared in the Preamble which refers to an "indissoluble Federal Commonwealth". The Parliament is referred to in section 1 as the "Federal Parliament".

Section 7 refers to a Senate composed of Senators "for each State". The emphasis on the need for the federal balance to be expressly stated is misconceived. It is not stated in so many words because it is obvious. An examination of the text of the Constitution in a dispassionate manner demonstrates that a careful division of powers between centre and States permeates the entire Constitution. It is dishonest to ignore this division, and draw no implications from it or to merely construe the words of a particular section in the abstract, without reference to the federal division. The Constitution is something more than a mere Act of Parliament. But even on basic canons of interpretation, an Act must be construed as a whole. To ignore the federal division is to fail to honour even this elementary principle.

One of the most fundamental of concepts upon which modern Western Civilisation was built is perhaps the principle pacta sunt servanda – that agreements (whether between individuals, or between State and people or even between nations) should be honoured. This principle is not a modern creation of western civilisation. It has been with man from ancient times albeit in an inarticulated form. The difference in the modern age was that it became more articulated, legally supported and sanctified as an effective principle of human conduct. This exaltation of the principle gave rise to constitutionalism and permitted free and orderly interaction between individuals so as to make possible the economic activity which produced modern civilisation. In the field of constitutional theory it meant the binding effect of the terms of a constitution fairly agreed upon.

Pacta sunt servanda was a particularly irksome impediment to the new constitutional theorists, as it was to law reformers. However by this time there were other emerging concepts. Karl Marx had said that the constitution of a nation was merely the formal superstructure of its social system and when the social system is changed, the constitution must necessarily change. Marx therefore directly questioned the legitimacy of formal constitutions. Few Western scholars were ready to venture as far as the repudiation of constitutional documents. But many saw in the

intellectual method of thinkers like Karl Marx a justification for making a written constitution pliant and responsive to intellectually comprehended, as distinct from popularly felt, needs. The effectively articulated and widely propagated intellectual views had Iittle difficulty in overshadowing the relatively inarticulated public opinion. In course of time, intellectual consensus began to displace popular wishes as the driving force of reform.

Major barriers to this intellectual tide lay in the field of legal theory, and in particular, constitutional theory. Here, the concepts of fragmented and limited governmental power, of individual rights and liberties, of the sanctity of contract and of judicial restraint were seen as orthodoxies standing in the way of universally desired objectives. Hence it became necessary for the new theorists to mount a relentless assault on the edifice of traditional legal theory. Justification for chipping away these perceived barriers became a predominant concern of legal thinking and scholarship became measured by the yardstick of its usefulness to the cause of facilitating effective government and the promotion of "social" purposes.

The doctrine of separation of powers and the classical view of the rule of law became, in the hands of these theorists, valueless abstractions conjured by Montesquieu and Dicey who were themselves mercilessly ridiculed. Engaging in self-fulfilling prophecies intellectuals and politicians denied the relevance of these theories to modern reality while proceeding to create that reality. Constitutionalism not only became unfashionable but was regarded as being in bad taste in many academic circles.

Whilst hacking away at the old legitimacy the reformists had also to construct the new. What would be the criteria of this new constitutional legitimacy? It had to be built upon a theory of necessity, inevitability and unavoidability. The approach to this task is illustrated by the following words of Professor Colin Howard.

The most important effect of the written constitution as a legal document is to inhibit political evolution... In its character as fundamental law the constitution entrenches an institutional structure of government that is both inflexible and complex. The effect is to distort the political process by compelling it to operate within a framework that is almost entirely unresponsive to the needs of a socially and technologically advanced democracy.

The suggestion here is that constitutional reform is needed and that the need legitimises the change. But the crucial issue is who determines the need. Undoubtedly those who propose a political programme which of necessity requires a greater centralised power in government will need changes. Those who wish to undertake legislative structuring of society will need changes. Those who seek uniformity of government rather than diversity will need changes. Those who equate nationalism wnh centralism will need changes. For all these people the fragmented power structures of the Constitution will appear as obstacles. And predictably their concept and vision of the society will appear to necessitate radical alterations of the Constitution.

Nevertheless, a claim of legitimacy quite obviously cannot be founded on the needs as perceived by one school of political thought, if the appearance of political pluralism is to be maintained. Hence it becomes necessary to mount an intellectual offensive that creates an aura of community consensus on the needs of the day. Once that appearance is sufficiently established, the constitutional guardians inevitably capitulate. Thus the High Court wilting under intellectual pressure began to endorse the new criteria of legitimacy. These criteria centred on the needs of society as comprehended by those who dominated intellectual discourse.

The composition of the High Court made it exceptionally susceptible to pressures of centralism. Being appointees of the Commonwealth executive, who were drawn mainly from careers associated with Commonwealth activity, the judges displayed a natural sympathy for the goals of the central government. In recent times several active proponents of the new legitimacy ascended

the High Court pedestal and in consequence, the substance and momentum of constitutional change began to accelerate.

It is said that institutions are microcosms of the larger community. That however, is true (if at all) of unmanipulated or spontaneously grown institutions. At any rate the High Court of Australia was not such an institution. Between the Court and the people, there existed the elite world of academics, journalists and politicians – the professed guardians of the public interest. The High Court was in fact the creature of this elitism. The Court drew its members and its inspiration from this world of "superior wisdom." Good and honest men who served on the Court hardly realised their distance from the community. Their intellectual milieu was one dominated by the new social theorists who regarded society as something to be designed and ordered to yield the greatest benefit. Not surprisingly therefore, they were persuaded to believe in the necessity and inevitability of expanding government authority. They were thus drawn unconsciously into the intellectual plot to re-draw the constitutional boundaries of power without the consent of the people.

The pro-Commonwealth activism of the High Court may itself have contributed to the public reluctance to endorse formal constitutional alterations. Pro-Commonwealth decisions which engaged public attention have drawn noticeably negative voter reaction. If on the other hand the popular resistance to constitutional change is owing to some "conservatism" of Australians, who amongst us is competent to fault them? The Australian Constitution was meant for the Australian people. To override their wishes, however misguided one may think they are, is to wrest the sovereignty of the nation from the people and to repose it in persons who have no legal or moral claim to it.

It is difficult if not impossible to fully comprehend the occurrence of such an extraordinary legal subterfuge in a nation deeply imbibed in constitutional tradition,unless the philosophical upheavals of this century which profoundly changed the problems and human solutions are taken into account.

The change in philosophical outlook was mainly the result of the new sense of human mastery over the environment, which in turn was inspired by the fabulous scientific and technological achievements of this century. This euphoric sense of human capacity quickly permeated every field of human learning and radically changed the way in which human problems were regarded, thus giving rise to the predominant social theories of our times.

It did not take long for leaders around the world (of all political persuasions) to succumb to an illusion of their capacity to fashion the destiny of humankind. This overpowering sense of capacity led them to think that the limited range of their power and authority was the main obstacle to the achievement of socially desirable goals. Given this feeling, few leaders feared the consequences of the imperceptible growth of power capable of both use and abuse.

As Western nations grew immensely wealthy and the bounty of democratic governments expanded immeasurably it seemed that all social ills were curable given the political will. This new faith provided the foundations of the greater part of intellectual discourse, and theories upon theories were built to support the new concept of all-embracing government.

Public opinion, when tested, always fell short of intellectual expectations and the more evident this fact became the more necessary it became for the social theorists to establish new criteria for legitimising constitutional change. The successive popular vetoes registered at constitutional referenda convinced these theorists that the average Australian voter was conservative, uninformed or indifferent to the problems of government. Alternatively he was regarded as a victim of reactionary manipulation incapable of independent thought and action. Faced with an unresponsive public, the intellectual attention inevitably shifted to the alternative forum of the High Court. Here, the arguments based on the "new economic and social realities", the

"compelling new circumstances" and the "necessities of modern government" fell upon vastly more receptive ears.

An Examination of some High Court Decisions

Uniform Tax

The power to raise income tax was initially conferred on both the Commonwealth and the State Parliaments. The Commonwealth adopted during World War II a devious method involving the enactment of four separate Acts to force the States to relinquish their income tax power and at the same time took over the State income tax departments. This was not all done directly. The intention to effect a de facto nationalisation of State Government activity was nowhere stated in the four relevant Acts. The High Court refused to look at either the real intention of the Acts or the relationships between them. Instead, it looked at each Act separately and found that authority for the enactment of the legislation could be found under various provisions of the Constitution. South Australia v Commonwealth (1942) 65 CLR 373. As a consequence of this case the States became heavily dependent on the Commonwealth for finance and the extent of the States' powers was considerably diminished.

The effect of the Act was to take over the State income tax power, the State income tax offices (buildings) and the State income tax officers. This happened during war time and part of the scheme was limited to the duration of the war. But once the Commonwealth had taken over the income tax field and imposed taxes equal to the prior State and Commonwealth taxes combined, it became politically difficult and impractical for the States to re-enter the income tax field.

The High Court was asked to look at the total effect of the Act – but it refused to do so. It looked at each Act separately and found that each Act was within the head of Commonwealth power.

This is a complex case – and I ask constitutional lawyers to pardon me for the brief summary, which must necessarily contain missing dimensions. The case is instructive because it is an example of a conservative literal approach to the Constitution, leading to a result favourable to the Commonwealth seeking to expand its power.

This case is an example of a situation which has frequently confronted the High Court. The issue arises whether an Act passed by the Commonwealth Parliament is within a head of power granted to it by the Constitution or whether it infringes a prohibition contained in the Constitution. The High Court may interpret the Act on the basis only of its words, even where an analysis of the Constitution as a whole, the intentions of Parliament, the effects of the Act would reveal that the Act contravened the Constitution's authorising and prohibitory provisions. This approach has made it possible to draft legislation in such a way that its real purpose and effects are concealed.

The Koowarta Case (1982) and the Tasmanian Dams Case (1983)

The Constitution confers on the Parliament the power to legislate with respect to "external affairs". In two cases in the early 1980s dealing with alleged racial discrimination and the building of the Franklin Dam, the High Court held that where the Commonwealth Executive has entered into a treaty, the Commonwealth Parliament has power to legislate on the subjects covered by the treaty even though under the constitution power to legislate does not exist. The Commonwealth Executive has the unfettered power to enter into a treaty. Apart from that, power of the Executive to act within Australia is derived from section 61 of the Constitution and Acts passed by Parliament. Where legislative power exists, the Commonwealth Parliament can, through legislation, confer power on the executive and other agencies. Prior to these two decisions the principle that Parliament could legislate to implement a treaty had been subject to a number of restrictions. The High Court swept away some of these restrictions and denuded the

others of practical significance. It recognised some restrictions that apply to parliament's legislative power to implement treaties, but these limitations are in practice likely to be of no effect. If they were, the Commonwealth legislation in at least one of these cases would not have been upheld.
Under the "external affairs" power the Commonwealth Government by the expedient of entering into a treaty can enhance the area of legislative power of Parliament.
A United Nations treaty or covenant exists on almost every conceivable subject on which parliament may wish to legislate. Therefore the effect of these judgments is to provide a very wide area of legislative power to the Commonwealth. The extent of this power is not appreciated because the Commonwealth is unlikely to explore it to any degree. Commonwealth Parliamentarians are elected by the inhabitants of the State. There are therefore substantial political restraints on the exercise of power. This does not offer much consolation. The power is available – and may be carefully selectively and perhaps ruthlessly used when a real need arises.
This case cleariy illustrates the tension between the two types of broad interpretation I outlined earlier.

Section 92 (Freedom of Interstate Trade)

Section 92 is a provision which places prohibitions on legislative power. It enacts "trade, commerce and intercourse among the several States shall be absolutely free".
In R v Anderson; ex parte Ipec-Air Ltd (1965) 113 CLR 177 and in Ansett Transport Industries (Operations) v Commonwealth (1977) 139 CLR 54, the High Court upheld a prohibition by a government body on the importation of aircraft essential for the conduct of interstate trade on the basis that the trade did not commence until the aircraft was imported.
The High Court held in this case that the Commonwealth Parliament had no power to prevent an airline operating inter-state services.
The effect of IPEC was far reaching. Since aircraft were not manufactured in Australia, the Commonwealth was able, by the simple expedient of refusing an aircraft import licence, to limit, close down, or control the inter-state operations of airlines. In the view of the High Court this did not affect the freedom of interstate trade, because it was anterior to the movement of trade.
The power of the Commonwealth to implement the two line airline policy is based on its export control power under 51(1) to legislate for trade and commerce.
The IPEC decision and many similar ones are consistent with the strictly literal construction that the High Court has for the most part purported to apply. Yet this commitment to literalism has often been contingent on the production of the desired result, i.e. the expansion of the powers of the Commonwealth. This too can be illustrated by reference to the Court's approach to Section 92. The Court has restricted the scope of the Section in two important ways. It has excluded (as shown in the above example) antecedent commercial activity from the protection of Section 92 even where such activity is essential to the exercise of free interstate trade. This was effected by strict literalism. On the other hand, the High Court has abandoned literalism to permit regulatory impediments to interstate trade by disregarding the Section's requirement that such trade be "absolutely free". The Court has held that regulation in the public interest is not inconsistent with freedom, and is necessary to preserve freedom. On a literal construction, how can regulation be consistent with the words "absolutely free"? In this case, the Court's approach has been clearly policy- oriented.
The two techniques in tandem have served to over-turn a central concern of the Constitution as agreed to in 1900. Constitutional theorists focus on the wider definition of interstate trade and commerce adopted by the High Court since the 1950s in a few cases that restricted Commonwealth legislative initiatives. However, taken in its totality, the High Court's interpretation of Section 92 has been permissive in relation to legislative experimentation,

particularly when the effects of its dichotomous approach are taken into account. The flourishing State and Commonwealth marketing and restrictive occupational licensing schemes constitute a monument to the failure of the High Court to give effect to Section 92. Clark King v Australian Wheat Board (1978) 140 CLR 120 represents the extreme case of the Court allowing a monopoly to prevent trade across State borders.

There have, however, been cases where Section 92 has been invoked to protect freedom of interstate trade. The most notable example is Bank of NSW v Commonwealth (1948) 76 CLR 1, where legislation nationalising the banks was held to be unconstitutional.

Most recently, the High Court has turned its back on all previous interpretations of Section 92 and rendered it virtually nugatory. In Cole v Whitfield (1988) 62 Australian Law Journal Reports 303, the High Court held that Section 92 now provides immunity only from Commonwealth or State laws that impose discriminatory burdens on interstate trade. The result (admitted in argument by the Commonwealth Solicitor-General, who supported the view) is that 32 cases where legislation had been previously found invalid are by implication overruled. Most of the discriminatory and protective Acts that have been held to contravene Section 92 are Acts of State parliaments. An important effect of the decision is to provide the Commonwealth Parliament with unlimited regulatory power so long as it treats all States uniformly.

This reinterpretation of Section 92 was supported by 16 Counsel, including eight Queen's Counsels and six Solicitors-General. It was opposed by a Queen's Counsel and Junior. The High Court did not offer any convincing demonstration that its reinterpretation of the Section was consistent with the words of the Section.

Professor PH Lane's comment on this case is quoted above.

Professor G de Q Walker (1980) argues that in the context of Section 92 the High Court has embraced outmoded economic doctrines supporting state intervention, despite the increasingly influential body of economic opinion that condemns restrictive occupational licensing and state trading monopolies as anti- competitive and contrary to the interests of consumers. In some Section 92 cases the High Court has invited Counsel to put before it evidentiary or other material that might assist it in forming its judgments. Walker argues that Counsel should invoke modern economic research suggesting that Section 92 should be so interpreted as to benefit consumers by promoting increased competition, wider freedom of choice, and lower prices.

Not unnaturally, the galaxy of Counsel representing government in Cole did not do this. Counsel representing individual litigants have likewise shown little familiarity with modern economic ideas. Sound arguments have not been made. Even if they had, it is doubtful whether a majority of High Court Justices, with their abiding faith in the power of government, would have understood the arguments.

Section 92 must be interpreted on its words. Yet the High Court cannot stop at merely looking at the words. Freedom is a concept that requires analysis in the context of political and economic theories, as well as the ideas that moved the drafters of the Constitution. A broad interpretation in the context of the specific words of the Constitution is therefore required. There are, unfortunately, no indications that the High Court will construe the Constitution in this way.

Conclusion

Finally, I wish to place constitutionalism in a wider framework. Democracy, the rule of law and constitutionalism are foundations of classical liberalism and are in fact the products of that tradition. But they are concepts which, owing to their very appeal, have been stolen and misused to lend support to ideas which are fundamentally opposed to liberalism.

The term "democracy" today means not the duty of government to conform to ascertained wishes of the people, in the context of a system of checks and balances on abuses of power, but the right of government to decide what is good for the people, on the basis that people have elected it.

The rule of law which once meant government, subject to known and stable laws and the Constitution, is today used to legitimate the momentary will of government. Rule by law has replaced the rule of law.

Constitutionalism involves much more than just having a Constitution. Most countries, including those which have authoritative and totalitarian regimes have a document called a constitution. Singapore and pre-apartheid South Africa not only had a constitution, but meticulously operated in terms of the Constitution with manipulated elections and a tame judiciary. Constitutionalism involves much more than just having a Constitution.

The High Court has denuded the Constitution of many of its significant limitations of power. If Parliaments and Cabinets are to have all-embracing power, what is the purpose of a constitution? We have not reached that stage yet – but we are moving in that direction.

The best short statement of the rationale of liberal constitutionalism is that of James Madison, the most influential draftsman of the United States Constitution. Madison said "But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary.

"In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed: and in the next place oblige it to control itself.

"A dependence on the people is, no doubt, the primary control on the government: but experience has taught mankind the necessity of auxiliary precautions (Federalist 51)".

Federalism is just one of the "auxiliary precautions" or "checks and balances" or "control's' – call it what you may – and this is a more powerful rationale for federalism than "States Rights".

Supporters of federalism over the years would have done better to rely less on State rights and rely more on the dimension that the division of power between centre and States provides for a check against unrestrained exercise of power.

The rewriting of the Australian Constitution has proceeded in blissful ignorance of or careless unconcern about fundamental features of constitutionalism – the system of checks and balances and the need for limitations on the powers of Parliament and Cabinet.

I can do no better than end by echoing Madison's emphasis on the need for "auxiliary precautions" and the obligation on government to control itself.

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Jumbunna Coal Mine (No Liability) v Victoria Coal Miners' Association (1908) 6 CLR 309,367-8.
Attorney-General for NSW v Brewery Employees Union of NSW (1908) 469,611-12.
Authorising Provisions for Commonwealth Parliament
51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
(i) Trade and commerce with other countries, and among the States:
(ii) Taxation, but so as not to discriminate between States or parts of States: ...
(iii) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth: ...
(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money: ...
(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth: ...
(xxix) External affairs: ...
(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:
122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.
Prohibitory Provision Applying to State Parliament
90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.
Prohibitory Provisions Applying to Commonwealth and State Parliaments
92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.
114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth nor shall the Commonwealth impose any tax on property of any kind belonging to a State.
Prohibitory Provisions Applying to Commonwealth Parliament
116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.
Regulatory Provisions Applying to Commonwealth and States
See 109, 96,106,107.

Chapter Seven

When External Means Internal

Dr Colin Howard

It is no doubt a matter of some familiarity to this audience that s.51 of the Australian Constitution is a list of what are called the enumerated legislative powers of the Parliament.
They are an entertaining collection of major preoccupations of the day interspersed with mere afterthoughts. They vary considerably in length, depending no doubt on the degree of rhetorical self- expression that the particular subject matter inspired in the delegates to the conventions of the 1890s who drafted them.
So, for example, we find that the institution of matrimony qualifies as a proper subject of federal law but, being highly respectable, is acknowledged rather tersely by the single word "marriage". It reminds one of the journalistic axiom that good news is no news.
This impression is strengthened by the immediately following item, which deals with divorce and associated matters in no less than 17 words. No mystery about what intrigued the delegates on that front. They were all men.
Incidentally the only other single word item in the list is "Quarantine". It really does begin to look as if marriage was privately regarded as some kind of affliction that the Commonwealth, with any luck, would abolish at the first opportunity.
As far as I know, I have the distinction of being the first person to suggest that the abolition of marriage might have been a motivating factor in federation.
Another of my favourites is the forthright, if not exactly hospitable, pessimism of the three word power "Immigration and emigration". It implies that the most that anyone not already here could be expected to do for Australia was to arrive, take a quick look and go away again.
How much more enterprising it would have been to invert the word order with the object of implying that Australians were so enamoured of their native country that if they left it they very soon came back again, appalled at the rest of the world.
But it has just occurred to me that I have managed to digress from the subject of this paper without even mentioning the subject from which I have digressed, so let me move on to the topic I am supposed to be talking about.
This is item 51(29), the legislative power dismissively summarised in the two stark words "External affairs". Not only did the concept of affairs external to Australia, excepting perhaps the Club Med variety, fail to enthuse the convention delegates, but also, once again, they revealed to the discerning eye their unacknowledged associations of thought: by putting this item neatly between "The Influx of criminals" (which disclosed a distinct lack of ancestor worship) and relations with the islands of the Pacific, which probably meant girls in grass skirts and nothing much else.
It amazes me that there are people around who regard the study of Constitutions as a dull and purposeless pursuit. On the contrary, it is an occupation worthy of Woody Allen himself. And, to come back to the point for the second time, nothing could illustrate this better than the fate that has befallen those two apparently harmless words "external affairs" at the hands of the High Court of Australia, not an institution normally associated with an overflowing sense of humour.

It will no doubt also be known to this audience that in Sydney in 1901, immediately after federation, there was published Australia's classic commentary on the Constitution, an imposing volume entitled Annotated Constitution of the Australian Commonwealth. The authors were, as they later became, Sir John Quick and Sir Robert Garran. Each had been closely associated with the conventions of the 1890s, Sir John as a delegate to the later ones and Sir Robert as a junior civil servant.

Sir Robert Garran in particular was a remarkably talented and learned man. He entered the Commonwealth Public Service immediately on federation and actually wrote out the first Government Gazette in his own hand and took it to the printer himself. He was the Commonwealth's first civil servant and had a long and distinguished career in that capacity.

He was no mere bureaucrat but a highly competent lawyer who later became Secretary of the Attorney-General's Department and after that Solicitor-General of the Commonwealth. Incidentally to those accomplishments he was a classical scholar and also published a volume of excellent translations of the 19th century German lyric poet Heinrich Heine.

I confess that whenever I have occasion to look back at those distant days and reflect upon the quality of some of the people who played prominent roles in the great debates of the time, including bringing this country into existence, I reflect ruefully upon how much better off we should be if a few of them were still in public life today. There is no comparison, and we are the losers.

In their great commentary Quick and Garran devote six closely printed pages to the external affairs power. Nowadays only one sentence is remembered. Even that solitary survivor has been reduced to a routine quote out of context. All it says is that the power "may hereafter prove to be a great constitutional battle-ground." It still may, but we should be so lucky. It is quite possible that the opportunity has been and gone without anyone really noticing.

What produced the solitary surviving sentence was the emergence even before federation of sharply contrasting opinions about what the deadly duo, "external affairs", were intended to mean. Before turning to them it is worth remembering that we are at the moment living through yet another of those embarrassing episodes during which assorted politicians and worthy citizens give tongue to much clamour about Australian independence.

All the usual trappings are on display: new flags, yet more anthems, dubious conduct in the presence of the Queen (all the more regrettable when the poor lady already has to cope with her own frightful family), whether we should be a republic and all the rest of it. In the years 1899 to 1901 this was decidedly not the atmosphere in which the external affairs debate took place.

Although the essentials of the argument were much the same as they are now, the details have changed considerably. Nowadays Australian independence from the United Kingdom is simply not an issue and has not been an issue since at least the passing by the British Parliament of the Statute of Westminster in 1931. Even that event was no more than a formal recognition that quasi-colonial status for the Dominions went out the window with the first world war (optimistically named at the time the Great War: little did they know).

With the benefit of hindsight we can see clearly nowadays that in 1901 the British Empire, vast and varied though it might be, was already heading into terminal decline. That was not how it looked at the time. On the contrary, to all appearances it was at its zenith, and a pretty spectacular zenith it was. The idea that in that situation the British Government would wish to retain control of its far flung Imperial policies was not merely respectable: it was perfectly natural. No doubt this was one reason why the neutral word "external" affairs was chosen instead of the more usual expression "foreign" affairs.

This is reflected in the contemporary commentaries. One approach went no further than remarking that s.51(29) was a new departure but that what it meant was not clear. True enough.

Another suggested that the UK Parliament, unless it were later minded to repeal the Commonwealth after all, intended to hand over control of Australian external affairs to Australia. To us this may seem stunningly obvious but in those days it was a pretty radical proposition.
A third approach went into the matter with more precision. There are many rules of construction that apply to Acts of Parliament. For the most part they are common sense rendered into legal language. One of them is that, in the absence of express words or necessary implication from the context to the contrary, an Act is assumed to be intended to apply only inside Australia and not extraterritorially.
The third approach to s.51(29) suggested that its purpose was to make sure that in its application to Commonwealth statutes this rule of construction remained precisely that: a rule of construction only and not a rule limiting the scope of any of the legislative powers. This was a shrewd suggestion that fitted the intellectual climate of the time.
To us the idea that the Commonwealth should not have power to enact laws with extraterritorial operation is a strange one indeed. It was not at all strange at the turn of the century when the contrast was between a mighty imperial power and a clutch of remote colonies whose concerns were almost exclusively domestic in character.
Quick and Garran however were not at all impressed, even going so far as to describe the rule of construction argument as untenable. (Lawyers, especially judges, use the word "untenable" as a polite synonym for "rubbish".) As far as they were concerned the external affairs power was a distinct legislative power in its own right and did not qualify any of the other powers in s.51. They then wrote another memorable sentence which ought to have been far more influential than the battleground one.
They said: "The expression `External Affairs' is apparently a very comprehensive one, but it has obvious limitations." The intellectual climate of the 20th century has not been one in which the idea of limitations and restraints has flourished. Since the concept of restraint in public life and international relations is overdue for a return to favour, the Quick and Garran view of the external affairs power is worth recalling.
I quote again: "It must be restricted to matters in which political influence may be exercised, or negotiation and intercourse conducted, between the Government of the Commonwealth and the Governments of countries outside the limits of the Commonwealth. This power may therefore be fairly interpreted as applicable to (1) the external representation of the Commonwealth by accredited agents where required; (2) the conduct of the business and promotion of the interests of the Commonwealth in outside countries; and (3) the extradition of fugitive offenders from outside countries."
The reference in the first of these three items to "accredited agents where required" to represent the Commonwealth overseas conveys vividly the contemporary lack of any concept of a full blown foreign service, or even the possible need for one, but that is immaterial. What is material, in my view, is the absence of any suggestion that the power to legislate for external affairs was, by implication, also a power of potentially unlimited scope to legislate for internal affairs in pursuance of international obligations.
The furthest that the learned authors go in that direction is to include extradition, which is unexceptionable. Although no part of their commentary, it is worth noting also that the original version of the power included the words "and treaties". These were later deleted but on what ground is not clear. What does seem clear is that their deletion is not consistent with an intention that the Commonwealth should acquire legislative power by merely entering into an international agreement.
The Quick and Garran analysis of the external affairs power is in my view clearly correct. It recognises that in the scheme of s.51 of the Constitution it cannot be relegated to a subordinate or

supplementary category but that equally it should not be elevated to a status that effectively predominates over the other legislative powers. Still less should it assume a character that invites any government to extend the scope of Commonwealth legislative power almost at will.

Nevertheless these things have come to pass. They have come to pass because in the last 30 years the High Court of Australia, in a mere handful of decisions, has seen the two words "external affairs" as holding the key to Australia's assuming its proper place in the international community. This I believe to have been a profound mistake in at least two ways. One is as a matter of constitutional interpretation. The other is as a matter of wisdom.

So far as constitutional interpretation is concerned I make one elaboration of the Quick and Garran argument which is required by the passage of time. It is exemplified by Australia's scientific and other interests in Antarctica. Laws are needed for such undertakings. The High Court has held that such laws may be based on the external affairs power on the ground that the undertaking has an obvious connection with this country and is external to it. I see nothing wrong with that.

Where I part company with the High Court is over its reaction to other changes in the world about us during this century. Compared with a century ago, the advance of technology in the fields of communication and travel has transformed the world to a previously unimaginable extent. Particularly since the second world war everyone has become internationalised. It follows that the implementation of international agreements and obligations has become correspondingly more important.

My disagreement with the High Court, or at least the majority thereof, is over the conclusion to be drawn from those indisputable facts. According to the Court they require an expansive interpretation of the external affairs power in order that Australian governments should not be hamstrung in the international sphere by constitutional limitations on the Parliament's legislative powers.

I disagree with the premise of that argument. Internationalisation does not make it in the least necessary to expand the external affairs power one step beyond the limits assigned to it by Quick and Garran except in matters of transient detail. The acceptance of international obligations is no warrant for interpreting basic provisions of anyone's Constitution out of existence in order to comply with them. To argue otherwise is to put the true situation on its head.

Legally the Constitution of a country is that country. I am not talking about totalitarian window dressing, where the so-called Constitution of a country is pure fiction. I am talking about a country like Australia where the Constitution has been freely adopted, has the force of law and is ultimately guaranteed by an independent judiciary.

In such a country as ours, the federal government in the international arena is exactly the same government as in the domestic arena. In both contexts the government is only what the Constitution says it is. It can do only what the Constitution says it can do. If it assumes international obligations that go beyond the legislature's domestic powers, so be it. To implement them it will have to take whatever steps are lawfully open to it to remedy the absence of power. In Australia this means either the co-operation of the States or else a constitutional amendment.

In saying that, I am well aware that neither is easily forthcoming; but I am not advancing a far-fetched or impractical doctrine. The limitations on federal legislatures are well recognised in international law and diplomacy. They are dealt with as a matter of routine by what is known as a federal clause. This simply acknowledges that a federal government may face constitutional obstacles that impede or prevent complete implementation of an international obligation.

There is not and never has been the slightest reason why the High Court should distort our own Constitution in order to make an exception of Australia in this respect. The United States of America has a much older federal Constitution than we do, and also a much more adventurous

Supreme Court, but I am not aware that any Administration has needed to be judicially rescued in a similar way.

That, then, is why I disagree with the High Court simply as a matter of constitutional interpretation. Its enormous expansion of the external affairs power runs counter to basic principles of construction, was justified by no emergency and seriously distorts the domestic balance of legislative power. I am unmoved by the observation, if it be made, that that balance has been seriously distorted in other ways since federation. No other change can compare in magnitude or significance with the one under discussion.

I turn now to my second point of disagreement, what I have called the unwisdom of the exercise. This turns on the uses to which this accretion of centralised power to the Commonwealth may be put.

Recently I wrote an IPA backgrounder on the external affairs power and the then forthcoming United Nations Conference on Environment and Development. By some mischance its acronym, UNCED, is pronounced unsaid in English, which positively invites the inquiry whether, as is usual on these junkets at the taxpayers' expense, most of what was said would have been better left unsaid, but I pass over that happy possibility.

The reason why I refer to the backgrounder is that to develop the unwisdom point today I need to repeat certain passages from it. If any of you now suffer a touch of deja vu, I do apologise. I was not expecting to be saying any more on the subject, unless perhaps in the courts, so soon afterwards.

I have sufficiently stressed already that the doctrine currently espoused by the High Court gives s.51(29) of the Constitution a very wide scope of operation indeed. That doctrine in summary is that the power supports legislation with respect to anything external to Australia which has an acceptable connection with Australia. An acceptable connection is, among other things, any international obligation that requires domestic legislation for its implementation.

Wide though it is, that doctrine has to be understood in the context of certain expansionary influences that are inherent in the interplay between government, Parliament and the High Court. The starting point is the apparently simple proposition that if Parliament purports to pass a law which does not come within the scope of any of its legislative powers, it is not a valid law at all.

Logically, if a law is not valid it is a nullity and therefore has no effect on anything. The problem with this is that, until the proper authority declares the enactment to be either valid or invalid, or partly the one and partly the other, no-one knows what the position is. The proper authority is the High Court but the High Court will decide nothing that is not brought before it as a formal dispute between parties. In other words, the validity or otherwise of an Act of Parliament cannot be determined unless and until a dispute comes before the Court the resolution of which turns on that question.

Since government cannot function in a permanent state of uncertainty about the validity of vast numbers of statutes that nobody bothers to challenge, the working rule is that an Act is presumed to be valid until judicial decision to the contrary. It follows that at any given time all kinds of laws are in operation which have some sort of apparent connection with one or more of Parliament's legislative powers but no- one actually knows whether the connection is sufficient to make them valid or not.

That alone, as a practical matter, expands the scope of any legislative power, for in this situation federal governments and parliaments tend to be distinctly optimistic about the width of the legislative powers. They are often encouraged in this by the circumstance that some of the powers will have been before the High Court seldom or not at all and are therefore particularly vulnerable to expansive assumptions about their scope.

A further expansionary influence is the judicial principle, expressed also in statutory form in s.51(39) of the Constitution, that to the central idea embodied in a legislative power there has to be added what is called the incidental power. This means matters necessarily incidental to the power or its execution.

Now consider the material that all this works on. I have no idea to how many treaties Australia is currently a party, using the term "treaty" loosely to cover any kind of international agreement. There must be hundreds of them at least, on widely varying subject matters. Implementation of practically every one of them can be referred to the external affairs power if nothing else is available.

Certainly there may be some constitutional obstacles on particular points (like freedom of interstate trade) that are not so easily overcome, but those are few and far between. Also it will be understood that I have passed over various secondary uncertainties, such as what amounts to acceptance of an international obligation short of a formal treaty, to what extent action can be taken against State governments and their instrumentalities, and similar matters.

Minor reservations of that kind are of little consequence when measured against the steadily increasing tendency to look to international rather than national action on world issues. Particularly is this so when some unusually grandiose project comes along, UNCED being an excellent example. I concede at once that the programs lying behind UNCED were, and are, so unwieldy, and so subject to political pressures that in themselves have little to do with the environment, that for the time being little if any changes to Australian domestic law need be anticipated.

That situation however can hardly last. Rightly or wrongly, by which I mean cogently or not, the environment is now big news and has long since received the ultimate political accolade of being seen to have a lot of votes in it. It is therefore not going to go away. Its potential for becoming an almost inexhaustible source of Commonwealth legislative power becomes correspondingly important.

There seems already to be general acceptance among those who are close to the action that UNCED handicapped itself by the unwieldiness to which I referred. Disregarding political obstructionism, it was grossly over-ambitious anyway. Sweeping measures ought not to be the order of the day. We just do not know enough. What we need is the patient accumulation of facts in particular contexts. The framework for an exercise of that kind is not a grandiose conference but a relatively concrete project.

As soon as we reach that stage, Australian legislative action can be expected. Even at that point the word "relatively" is important. The price of international agreement invariably is vagueness of language. Anyone who doubts that need only inspect the Racial Discrimination Act 1975. Inspection of that Act reminds me of the so-called Bubble Act passed by the British Parliament in 1720 in a panic reaction to the first great stock market collapse known as the South Sea Bubble.

It was widely and erroneously supposed that joint stock companies were the cause of the crash, so Parliament legislated to abolish companies. The Act was couched in such comprehensively obscure language that no-one was ever able to work out whether companies had been abolished or not. To be on the safe side everyone assumed that they had been. It was the most successful statute ever enacted.

The draftsman is unknown but he should have been immortalized as the greatest of them all. Alone and unaided, without the need for a single prosecution, he delayed the development of the modern registered company by well over a century. A barren but nevertheless splendid achievement. My point is that the external affairs power will shortly require an abundance of

parliamentary draftsmen of his calibre. All the current ones are employed full time on the Income Tax Assessment Act.

In conclusion let me briefly sketch just two of the consequences which could follow from UNCED, even on the material in existence right now. Suppose that an Australian government became a party to a convention on climate change which was aimed at cleaning up the atmosphere and predicated on the supposition that the atmosphere needs cleaning up.

Such an undertaking could well bring with it power to nationalize anything industrial or commercial that could be suspected of affecting the climate. If outright nationalization proved to be impracticable for some incidental constitutional reason, comprehensive regulation should achieve the end in view just as effectively.

As another example take a convention on the conservation of biodiversity. It is quite possible that definitions of biodiversity abound and do not necessarily translate literally. I know that at least one says that the term "means the variety of and variability among living organisms and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems."

As I have observed on a previous occasion, this seems to cover pretty much anything except humans or human activities, for it is no more politically correct nowadays to point out that humans come in different colours and sexes than it used to be to say that people are not born equal.

The significance of the definition, taken in conjunction with the High Court's current interpretation of the external affairs power, is that its implementation could comfortably cover the nationalization of farming, or at least total central government control of land use for pastoral and agricultural purposes.

The heart of the matter is that the concept of the environment is so extensive that it can be persuasively argued to encompass in one way or another almost all human activity. If one takes into account pressure of population in marginally fertile areas, it might even include conceiving and giving birth.

In this way UNCED furnishes the most striking illustrations to date of the inappropriateness of the High Court's current approach to the external affairs power. That approach mortgages the domestic effect of much of our Constitution to the incidents and accidents of international diplomacy.

The conduct of diplomacy necessarily tends to be influenced by events outside the country rather than inside. In my view it follows that, exactly as Quick and Garran envisaged with remarkable prescience long ago, the emphasis should be not on expanding the external affairs power but on setting sensible limits to its proper area of operation.

It is easy of course to take extreme examples to make a point and lay oneself open to the rejoinder that it would never happen. My concern is not with suggesting that any of the more startling possibilities of abuse of the external affairs power actually will come to pass. My purpose is simply to say that the current state of the law is such that they could come to pass.

That should not be the case.

Addendum

Since writing the foregoing I have recalled another striking recent instance of the consequences that can flow from the current interpretation of the external affairs power. It involves the Mabo case and the Racial Discrimination Act 1975 of the Commonwealth.

No doubt you will all recall the 6:1 majority decision of the High Court on 3 June 1992, with only Dawson J dissenting, in Eddie Mabo v. Oueensland. It was the case in which the High Court fundamentally altered the law of property by inventing what it called native land title.

This concept enables groups of indigenous Torres Strait Islanders and Australian Aborigines to base a claim to ownership of land on their own laws and customs as an alternative to Australian law as previously understood. The social, economic and legal implications of the case are staggering in their depth and scope, but I have no time on this occasion to go into them. I make only the following point.

Under most circumstances there would not be too much difficulty in modifying the effect of a judicial decision by legislation. A matter of land law in particular is for State legislatures, not the Commonwealth, except of course in the federal territories. The States however, as you will know, have to live with the s.109 of the Constitution problem: that their laws are displaced by valid laws of the Commonwealth on the same subject.

The High Court held the Racial Discrimination Act valid years ago. If the States enact laws modifying the Mabo decision in the matter of native land title, their laws are almost certain to conflict with that Act; yet that Act is itself valid only as an exercise of the external affairs power because it depends upon an international treaty obligation entered into by an Australian government.

As I have had occasion recently to observe elsewhere, it is hard to get more internal than the law of title to land. Without the convenient help of the external affairs power, as at present interpreted, neither the High Court nor the Commonwealth would have been able to impose on the States this fundamental change in the law.

It is perhaps worth bearing in mind also that native land title can benefit at most 1.53% of the population, and probably in practice a far lesser percentage, upon whom we already spend upwards of a billion dollars in public money annually. I am sure that there is not a single Government or Opposition in the country that particularly relishes sorting out where we go from here.

Truly, those two innocent-looking words, "external affairs", have much to answer for.

Chapter Eight

"Some Thoughts on the Monarchy/Republic Debate"

Sir David Smith, KCVO, AO

May 1901 saw the opening of the first Commonwealth Parliament in this city of Melbourne by The Duke of Cornwall and York, later King George V. May 1927 saw the opening of the temporary Parliament House in Canberra by The Duke of York, later King George VI. May 1988 saw the opening of the permanent Parliament House in Canberra by Queen Elizabeth II. It was thus both significant and appropriate, if coincidental, that May 1992 should have seen the establishment in Sydney and Melbourne of two separate and different organisations, yet each dedicated to the defence of the constitutional arrangements represented by the events which I have just mentioned.

The Sydney organisation goes by the descriptive title of Leadership Beyond Politics : Australians for Constitutional Monarchy, while the Melbourne organisation is the one which has brought us together this week-end under the title of The Samuel Griffith Society, a name which commemorates one of the fathers of our federation and one of our greatest colonial statesmen.

Samuel Griffith was a Government Minister in colonial Queensland from 1874 to 1878, Leader of the Opposition from 1879 to 1883, Premier of Queensland twice, from 1883 to 1888 and from 1890 to 1893, and was appointed Chief Justice of Queensland in 1893. He was appointed the first Chief Justice of the new High Court of Australia in 1903.

According to Dr Brian Galligan of the Australian National University, Samuel Griffith was one of those great men of Australian colonial life who dominated its politics, reflected its values, and who was part of the generation "who put in place the institutions of government that have shaped and moulded Australian politics and public life ever since". It was Griffith who drafted the constitution bill that was presented to the first Constitutional Convention in 1891 and who piloted it through the convention. He did not attend the 1897-98 convention that finally produced the Constitution: by then he was Chief Justice of Queensland and that colony did not send a delegation to that convention. But so impressive had been his work at the abortive 1891 convention that it secured for him the High Court appointment in 1903.

When John Stone asked me for a title for my remarks tonight, I said I would share with you some thoughts on the current monarchy/republic debate. It is true that this week-end conference, and the society which has arranged it, are concerned with our Commonwealth Constitution as a whole, and with the whole gamut of this country's governmental arrangements which flow from that document. But the nature, and the role, of our Head of State are fundamental to our system of government as a constitutional monarchy, and it seemed appropriate that I might say something on that subject, particularly as you are to hear more on the subject tomorrow morning from two distinguished scholars, John Paul from the University of New South Wales, and Bruce Knox from Monash University.

The current debate began at the Australian Labor Party's national conference in Hobart last year. Responding to a resolution moved by a federal caucus back-bencher, and after a singularly lacklustre discussion, that conference decided that this country would commemorate its centenary of federation as a constitutional monarchy by becoming a republic, and that we would first be subjected to a ten-year education campaign to help us decide what was good for us. So

well thought out was this proposal that they even had an argument about whether the operative date in the year 2001 would be the 1st or the 26th of January.
Next we saw the establishment of the Australian Republican Movement, an organisation whose aim is to turn Australia into a republic simply by taking "The Queen" and "Governor-General" out of the Constitution and replacing them with "President". This very limited proposal for constitutional amendment has angered other republicans who seek much more extensive constitutional change.
In a public lecture given in Parliament House, Canberra last week, the Clerk of the Senate, Mr Harry Evans pointed out that, if the only thing that the republican movement wanted to change was the title of the Head of State, then our constitutional system was in good shape. He went on to say that, whereas there was demand in Britain, Canada and New Zealand for radical constitutional change, many of the changes being sought in those countries were already in place in Australia. He cited as examples the lack of a written constitution in Britain, the lack of a written constitution, an upper house, and state or provincial governments in New Zealand, and the lack of an elected upper house with equal representation for the provinces in Canada. Australia has all of these things, and has had them since 1901, right from the start.
The third shot in the republican armoury was fired by the Prime Minister immediately following The Queen's visit in February of this year. Let me say at once that I saw nothing in the way in which the Prime Minister and his wife greeted The Queen and the Duke of Edinburgh, and escorted them during their official functions, which would have given any offence. I do not, of course, have the slightest idea what The Queen and Prince Philip thought at the time, but I should be very surprised if the Royal visitors found their hosts anything but courteous and attentive.
The British Press, on the other hand, with some encouragement from here, indulged itself in an orgy of outrage. Editors and journalists who for years have behaved most despicably towards their Sovereign, and her family, and continue to do so, had the effrontery to lecture us on how to behave towards our Sovereign. The immediate upshot was a series of attacks by the Prime Minister on every one and everything with a British connection. Not only were we, and our foreign neighbours, told that our Head of State and our flag had to go. The history of the Second World War in the Pacific, and Britain's role in it, were rewritten and, for good measure, the names of Churchill, Menzies and Casey were dredged up and their memories traduced, all in the name of building one nation.
The saddest part in all of this was the way the Prime Minister characterised supporters of the monarchical system of government as un-Australian, unpatriotic, even disloyal. We became lickspittles and forelock tuggers. Suddenly, in multicultural Australia, there was room for every cultural heritage except the one that established the modern nation and laid the foundations of the society in which we all live today. For a time, patriotism seemed to be the sole preserve of only one side of politics, until the Caucus found that it had some outspoken monarchists in its ranks, and the Government found that it had a supporter of The Queen and the present flag in at least one of its Minsters.
Former Prime Minister, Bob Hawke, in a speech to the National Press Club two years ago, had no difficulty in reminding his audience that we had acquired from Britain our "fundamental principles of parliamentary democracy, freedom of the individual and the rule of law". We also received from Britain the great heritage of her language, her laws, her customs, her literature and her philosophy - in short, her culture. Now, it would seem, we are to deny our past and denigrate the institutions that have helped to make us the free and democratic nation that we are. But what else can we expect when even that high and important institution, the office of Prime Minister, is

reduced to the level of a kindergarten play-ground toy? "Please, Miss! Bobby's had it long enough: now I want a turn!"

The British institutions which we inherited have given us a system of government which is a democratic, parliamentary, responsible, constitutional, Westminster-style monarchy, and I am assuming that I don't need to define any of those adjectives for this audience. This in turn has enabled this country to become what Sir Ninian Stephen, the then Governor-General, described as one of the oldest continuous democracies in the world. He pointed out that only Britain, the United States of America, Canada, Switzerland and Sweden could look back on longer periods of democratic rule, uninterrupted by dictatorship of the left or right, or by foreign conquest and occupation, than could Australia. He went on to say that we have had a much longer experience of making decisions for ourselves, by democratic means, than all but a handful of the almost 200 nations of today's world; and even today, democracy, as we have so long known and understood and enjoyed it, is still a relative rarity among the nations of the world.

It's interesting to note that, of the six oldest continuous democratic nations listed by Sir Ninian, four - Britain, the United States, Canada and Australia - are British in origin, and four - Britain, Canada, Sweden and Australia- are monarchies.

The Monarchy has provided strength and stability to our system of government, and a sense of unity to our nation. It is part of our history, and it is no less Australian just because its story began in England or because we share it with Canada or New Zealand or Papua New Guinea or the many other monarchical countries within the Commonwealth. Our latter-day republicans, I suggest, are not being so much pro- Australian as anti-British, and that surely must be a most unworthy sentiment on which to base a campaign which will divide this country as it has never been divided before. What then are the reasons which our would-be republicans give for wanting to foist this doubtful blessing on us?

We are told that our independence and our nationhood are at risk while we remain tied to the British Monarchy, the British Government, and Britain. The fact is that Australia has long since severed all legal and constitutional ties with Britain and with its Government. We are an independent nation and our formal links with Britain today are no different from our formal links with any other country with which we maintain friendly relations. We have been for a long time as independent as we could ever be as a republic, and the suggestion that we need to change our constitutional arrangements to become more independent is simply not true. I am reminded of something the political journalist Peter Costigan wrote in The Canberra Times last year: "Imperfect though it is (and who has ever written a perfect constitution?) Australia's Constitution has proved for 90 years to be a protection for the people against the whims of those temporarily in power. Voters have demonstrated their unerring belief in its importance by rejecting so many attempts by politicians to fiddle with it."

We are told that it is un-Australian to want to have The Queen of the United Kingdom as our Head of State. The fact is that we don't. Our Monarchy is not a British one, it is an Australian one, as a result of legislation introduced into the Australian Parliament by Prime Minister Menzies nearly 40 years ago - the Royal Style and Titles Act 1953. Popular legend has it that Her Majesty became Queen of Australia 20 years later, as a result of Prime Minister Whitlam's Royal Style and Titles Act 1973, but that is not true. What that Act did was remove from The Queen's Australian style and titles the former references to "United Kingdom" and "Defender of the Faith". Mr Whitlam had also wanted to remove the words "by the grace of God", but The Queen would not hear of it. Mr Whitlam later described that particular audience with his Sovereign to some of his legal advisers as the only occasion on which he was bested, but I can think of at least one other.

Next, the republicans claim that we must change our ways to meet the needs of those who have joined us as immigrants. We are told that non-British migrants cannot comprehend our system of constitutional monarchy. The fact is we are all either immigrants or the descendants of immigrants, and that includes the Aborigines. The successive waves of immigrants have brought with them different cultures and traditions and languages. My own experience, as a first generation Australian whose parents were of non English speaking background, was that most of our early immigrants became loyal Australians and adopted Australian customs, at the same time making their own contributions to what they found here, and making us a better and richer and more tolerant society in the process.

For the most part they did not lose sight of the fact that they came here because, for them, life in their own country had become, or was likely to become, intolerable, and this country offered them something better. For one reason or another, the systems of government from which they fled did not offer to them, as citizens, the fundamental freedoms and protections which our system of government offers to its citizens. That being the case, it makes no sense to suggest that the presence of non-British migrants in this country should be used as an excuse to do away with anything and everything that is of British origin. More to the point, virtually all of our immigrants of necessity, as distinct from our immigrants of choice, have fled from countries governed by one version or another of the republican form of government.

My own experience tells me that the vast majority of them do not want Australia to become a replica of what they left behind, and that they resent being used as scapegoats in the republican campaign. We may be hearing the views of certain so-called ethnic community leaders, but we certainly are not hearing the views of those whom they claim to represent and on whose behalf they presume to speak.

We are reminded regularly that we are part of Asia, and that this is an additional reason for rejecting this country's British cultural inheritance. Certainly Australia is geographically part of the Asia-Pacific region, but the region comprises many different countries with many diverse cultures. There are even wide cultural differences within many of these individual countries, so I wonder just which Asian country and which Asian culture we are to identify with. And what about the Asian monarchies of Japan, Thailand and Malaysia? They would surely find it strange that we should contemplate changing our system of government to a republic in order to identify more closely with them. The very notion that our monarchical status is an inhibiting factor in our bilateral diplomatic, strategic or trading relationships with our Asian and Pacific neighbours is as insulting to them as it is offensive to us. That would have to be the ultimate cultural cringe. Our Asian neighbours are rightly proud of their respective cultural inheritances, and would expect us to be proud of ours.

Professor John Passmore, Emeritus Professor of Philosophy at the Australian National University, with an international reputation, particularly in Britain, Canada, the United States and Japan, gave a public lecture recently under the title "Europe in the Pacific". In developing his thesis Professor Passmore said "that to understand, and take advantage of, our place in the world we shall do best to think of ourselves not as `a part of Asia' but as a European country which has special opportunities and confronts special problems in virtue of its close proximity to ... `South Eastern Asia'. ...Before we decide to regard ourselves as a part of Asia on account of our proximity, we should remember that most parts of Europe are much closer to large areas of Asia than we are to any part of Asia except, in respect to our far North, to Indonesia. Unlike us, Europeans can send goods to Asia by rail or truck - in the case of Turkey simply by crossing a bridge."

And for an Asian view on this matter let me quote from a speech given recently in Perth by Professor Wang Gungwu, Vice-Chancellor of the University of Hong Kong, who said "Australia

should not consider itself as a part of Asia, but as an interdependent, indispensable partner in the region's future."

Lest my remarks about Australia's relationships with Asia and the countries of the Pacific be misconstrued as being at odds with the Prime Minister's view that we need to establish special relationships with them, let me hasten to add that, at Government House, we were busy making our contributions towards the establishment of special relationships years ago. Both in our own way, and with the assistance of officers of the Department of Foreign Affairs, we started practising fifteen years ago what the Prime Minister has so recently been preaching.

The final arguments which the republicans trot out are that we should have an Australian carrying out the duties in Australia as our Head of State, and that The Queen cannot represent Australia overseas. Both of these arguments are clear examples of sophistry because their proponents mischievously ignore or misrepresent the role of the Governor-General.

The Sovereign has never attempted to represent abroad any of the other monarchical countries of the realm, other than the United Kingdom, and none of the other monarchical countries have ever expected or even thought that the Sovereign could or would do so. That has always been the role of the Governor- General and, so far as Australian Governors-General have been concerned, they have fulfilled it with grace and distinction, and with great credit to Australia. Regrettably, Australian Governments were slow to realise the diplomatic potential of State visits abroad by Governors-General as the representatives of their country: though Canada first started sending its Governors-General on official visits to other countries as long ago as 1927, we didn't do so until 1971. In fact, Buckingham Palace has long had a much better appreciation and understanding of the diplomatic role which a Governor-General is capable of discharging on behalf of his country than has any Australian Prime Minister, even to stipulating that Governors-General should be received by foreign host governments as the head of their country, and with all the proper marks of respect due to a visiting Head of State.

All of the host countries visited by Governors-General Sir Paul Hasluck, Sir John Kerr, Sir Zelman Cowen, Sir Ninian Stephen and Mr Bill Hayden have indeed acted in this way during 27 State and official visits made to 20 countries, and all but one of them in Asia or the Asia-Pacific region. Australian Governors- General have even been accorded special courtesies by foreign Heads of State and their governments when travelling abroad privately and unofficially while on leave, so it is just humbug to speak of this country needing to become a republic in order to be properly recognised and accepted by other countries.

If, then, and contrary to what the republicans would have us believe, our present constitutional arrangements and our present system of government do not diminish our independence, do not proclaim subservience to a foreign government, do not upset our Asian neighbours nor the rest of the world, and do not offend the majority of our own citizens, whether Australian born or foreign born, then we must look for some other motive for the push to replace the appointed Governor-General with the elected President, for that is the nub of the republican issue.

As I said earlier, the republicans want to amend our Constitution to substitute "President" for "The Queen" and "Governor-General": the powers and duties presently assigned to the Governor-General would remain unchanged. As Mr Gough Whitlam reminded a law students' symposium held recently in Canberra, the Sovereign's constitutional duties are virtually limited to appointing the Governor-General on the advice of the Prime Minister. All of the duties as Australia's Head of State under the Commonwealth Constitution or under laws made by the Australian Parliament are carried out each day in Australia by an Australian – the Governor-General.

It is true that there was once a time when Australia's Governors-General were agents of the Imperial Government and owed their first duty to British interests. But that arrangement came to

an end in 1926 – sixty-six years ago, so it hardly provides any sort of argument today. It is also true that there was once a time when Australia's Governors-General were appointed by the Sovereign on the advice of British Ministers. But that arrangement came to an end in 1930 – sixty-two years ago, so that too provides no sort of argument today. If ever Australians were reminded that Australia's sovereignty was firmly located in Canberra and not in London, it happened when the then Labor-appointed Speaker of the House of Representatives asked The Queen to intervene in the 1975 dismissal and to restore the Whitlam Government. Mr Speaker was told by Buckingham Palace that the Australian Constitution placed all constitutional matters squarely in the hands of the Governor-General. That, surely, put an end to all doubts about where Australia's sovereignty lies.

Of the 21 Governors-General since federation, eight have been Australians. I have had the great privilege of serving the last five of them, and of knowing two others – Lord Casey and Sir William McKell: the first one – Sir Isaac Isaacs – was appointed before I was born. Of the eight, five of them had previously held political office, but none could ever have been accused of allowing former partisan interests to interfere with their performance of their duties. For each of them, their personal integrity, coupled with the knowledge that they had been appointed – not elected – and that they were the personal representatives of their Sovereign, were enough to ensure their commitment to their oath of allegiance and their oath of office. The question we are entitled to ask is whether having an elected President would guarantee us the same high standards.

At first the republicans simply said that they wanted an elected President, as if election to office was itself a sufficient guarantee. Now they want the President to be elected by the Federal Parliament, and not by the electorate at large. If I were Prime Minister of this great country, with all the awesome responsibilities of that high office, the last thing I would want breathing down my neck would be an elected Governor- General, or an elected President, claiming to represent his or her own constituency. And that's not such a fanciful notion. In the course of my travels overseas on duty with our appointed Governors-General, I was present at a gathering of a number of Governors-General, both appointed and elected, when one of the latter was heard to propose, quite seriously, that, as their respective Prime Ministers gathered together periodically for important multi-lateral conferences of one kind or another, it was time that they, too, should come together in similar fashion, for they, too, had been elected and had important constituencies to represent. Fortunately, our appointed Governor-General was able to say that such a proposal could not concern him.

As well as claiming an independent mandate, an elected Head of State might also have an independent attitude to his constitutional duties. Again let me give an actual example. Papua New Guinea's Governor- General is appointed by the Sovereign on the advice of the Prime Minister. But the Prime Minister is required to recommend the person who is elected by the Papua New Guinea Parliament. During the term of the previous Government a code of conduct tribunal found a Minister guilty of acting corruptly and recommended his dismissal from office. This required Executive Council action, and the Prime Minister put an appropriate recommendation to the Governor-General in Council. But the Minister was a friend to whom the Governor-General owed a debt of gratitude because of past associations, so His Excellency repaid his debt by refusing to accept the advice of his Ministers to terminate the disgraced Minister's appointment.

At least one newspaper, The Canberra Times, regards the risk of having an elected head of state so seriously that, in an editorial in support of a republic, it rejected the notion of election by politicians because it felt that a President with an independent fount of political power was an inevitable prescription for trouble – which is my point precisely – and suggested instead a

continuation of the present system of selection by the Prime Minister – which of course confirms the wisdom of retaining the Governor-Generalship and its method of appointment.

We may prefer to think that the risk of a Head of State who would refuse to carry out a constitutional duty because of mateship could not happen in Australia. Well, let's look at the record, and examine the actions and the expectations of those who believed they had some claim to the allegiances of two of our Governors-General. Governor-General McKell was appointed in 1947 on the advice of Prime Minister Chifley. McKell had previously been Labor Premier of New South Wales. The Chifley Labor Government lost the 1949 elections and Menzies became Prime Minister. His Government had to contend with having important legislation blocked by a hostile Senate, and in 1951 he declared his intention to recommend to the Governor-General that he be granted a double dissolution of the Parliament to enable an early election to be held for both the House of Representatives and the Senate. The Labor Opposition, believing that "their man in Yarralumla" would not grant Menzies his request, were outraged when he did. The Party felt betrayed by a "mate", notwithstanding that all the conditions necessary for a double dissolution in accordance with section 57 of the Constitution had been met, and that the Governor-General had merely done his constitutional duty. In the view of the former doyen of the Federal Parliamentary Press Gallery, the late Allen Reid, the abuse which the Labor Party heaped on Sir William McKell was as bad as anything done to Sir John Kerr 22 years later. In the case of Sir John he, too, was regarded as a "mate", though he had never held political office, and much of the calumny directed at him was because he had acted contrary to the Party's interests, and because there had been some expectation that his past associations with members of the Party would ensure that he would not.

In each case there were those who belonged to the Party which had nominated the Governor-General who believed that he would act to protect the Party's interests, no matter what his sense of duty might dictate. What, then, would be their expectations if they had actually voted him into office? And what might an elected President do in similar circumstances if he were free of the twin restraints of holding an appointed office, and being the personal representative of the Crown in Australia?

We have every reason and every right to be proud of the origins of our Australian heritage, and mere ideological prejudices provide no justification for change. True, in a democracy such as ours, people are entitled to seek changes to our system of government by peaceful and constitutional means, and if ultimately a majority wishes for change then change must happen. In similar fashion, those who wish to retain the existing system are also entitled to press their case, without being ridiculed or abused for doing so, and I am grateful to this Society for allowing me an opportunity to press mine.

Nations do sometimes change their national institutions and their national symbols – Constitutions are amended and flags are redesigned – but usually such changes occur as a result of some dramatic event in a nation's history. It must surely be unprecedented for a nation's Head of Government to declare his country's Constitution and flag to be unacceptable, solely because of their historical connotations, and then to cast about in search of alternatives. Less democratic and less tolerant societies would regard such action, at best, as unpatriotic, or at worst, as disloyal.

There is much that is wrong with the way this nation is governed and administered at the present time. Never before have we had so many Royal Commissions and other inquiries into our processes of government and public administration; never before have we had so many public office-holders and other public figures either in prison or facing that prospect; never before have the electors registered their dissatisfaction with the political process by returning so many independent and minor party candidates to Parliament; never before has Australia had so many

of its citizens who are hurting because of what has been done to them by their Governments and by their fellow Australians.

And yet despite our current economic problems – none of which has ever been attributed to our system of government – and despite the undoubted economic hardships which many Australians are enduring at the present time, under our present system of government we have produced a society which is still one of the most comfortable and safest in which to live and to work and to raise one's children. We have much to do to improve our standards of public life, but if there is one thing that we do not need to change it is the unifying influence of our constitutional monarchy. Somehow I think that Sir Samuel Griffith would have agreed.

Chapter Nine

The Head of State in Australia

John Paul

The second Covering Clause of the Commonwealth of Australia Constitution Act reads as follows: "The provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty in the Sovereignty of the United Kingdom of Great Britain and Ireland". Australia's link with the British Crown dates from 1770 when Captain James Cook R.N. took possession of eastern Australia "in the Name of His Majesty King George the Third". This link was confirmed on 26 January 1788 when Captain Arthur Phillip R.N., as Governor-designate of the Colony of New South Wales, and a group of officers, standing ashore at Sydney Cove under the British flag, drank toasts to the health of the King, the Royal family and the success of the newly inaugurated Colony.

Australia's Head of State has therefore been the British Monarch from King George III to Queen Elizabeth II during Australia's transition from a colonial status to that of an independent kingdom linked with other independent kingdoms in a personal union of crowns. This short study, while acknowledging this union of crowns in one person, will concentrate principally but not exclusively on the Monarch's local representatives in vice-regal office, or, to employ Professor Anthony Low's term for them, our "surrogate Royals". This paper will touch only lightly on the constitutional changes which affected the role and standing of the Monarch and of these local vice-regal dignitaries. Sir David Smith, in his address to the Society on the evening of 25 July, gave a very full account of Sir Samuel Griffith's distinguished career; one item which he omitted, because it is very easily overlooked, was Griffith's term as Lieutenant Governor of Queensland which ran from 1899 until 1903, when his appointment as Chief Justice of the newly established High Court of Australia obliged him to vacate that vice-regal office along with the Chief Justiceship of Queensland.

The powers vested in Captain Arthur Phillip and his immediate successors were sweeping; more extensive in fact than those the Monarch they represented could constitutionally discharge on his own initiative in Great Britain. And this introduces us to a theme which recurs in Australian constitutional history. Political forces, either through combining or reacting one to another, have from time to time forced our surrogate royals on their own initiative to invoke prerogative powers which, while still extant in Britain, have seemed to fall into desuetude through a less tempestuous if not more orderly conduct of political affairs.

On this form of colonial government, Professor Enid Campbell has written in the Royal Australian Historical Society Journal, vol. 50:

The form of government employed in New South Wales between 1788 and 1823 was altogether unique; never before had the Crown withheld legislative institutions from colonies governed by English law and assumed to itself or delegated to colonial Governors the authority to make laws for the colony which would otherwise have been entrusted to a colonial legislature.

Unique as this form of government undoubtedly was, it was unremarkable in its foundation inasmuch as the metropolitan power was transplanting to New South Wales, not planters, but prisoners and their gaolers. Further to this Professor W G McMinn has written in his A Constitutional History of Australia (1979) p.4:

...Australia's first system of government can best be described as an autocracy. There was always a problem of authority, but the governors were forced to govern: which meant, in this extraordinary and new colony, that they often ignored nice points of law. Indeed, at times they could not avoid taking actions which might seem quite arbitrary.

It also meant that their authority could be challenged locally, as Governor William Bligh in an extreme case was to learn to his cost. The stumbling block in the path of introducing and extending representative institutions to New South Wales was and remained for some time the very reason for the establishment of such an autocracy in the first place: the continued transportation of convicted felons.

The last Governor of New South Wales to exercise these autocratic powers throughout his term of office was arguably the greatest of all of New South Wales's governors, Major-General Lauchlan Macquarie. It fell to his successor, Major-General Sir Thomas Brisbane, an engineer, to implement legislation enacted at Westminster which established a nominated Legislative Council, and to his successor, Lieutenant-General Sir Ralph Darling, to implement further legislation in 1828 which expanded that Council in size and authority. In 1825 a Legislative Council had been established in Van Diemen's Land when it became a separate colony to assist the Lieutenant Governor, Colonel George Arthur. In 1842 the New South Wales Legislative Council was broadened to allow two-thirds of its membership to be elected on a 10 pounds property franchise extending to both free and freed. But this did not mean that conflict between this rudimentary legislature and the executive in the person of the Governor could be avoided.

Surveying the developments in New South Wales from 1842 until the introduction of responsible government there and in Victoria, Tasmania and South Australia in 1855-56, Professor McMinn has had this to say (pp. 40-1) on perhaps the most turbulent period in Anglo-Australian relations:

An historian tracing in the post-imperial world the constitutional development of a British dependency can easily fall into the trap of seeing it in terms of a `struggle' – series of hard-fought but almost divinely ordained stages leading, despite stubborn opposition from London, to either the formal independence epitomized by the United States and India or the de facto independence of Canada and Australia. The risk is particularly great for an Australian historian because the leading participants in the `struggle for self- government' drew much of their rhetoric from the history of the American Revolution and of their practical inspiration from Canadian experience. But such a view is both over-simplified and distorted. The attitude of British governments, whatever colonists may have thought, was never blindly negative; and the Australian experience, despite superficial similarities to that of other colonies, was fundamentally very different. Events in Australia were always in a minor key; and, while attachment to the principle of representation was genuine, the pressures which developed into a demand for responsible government had their origin not, as in the American colonies, in the abstract political theory of the eighteenth century `Enlightenment' or, as in Canada, in the tensions of rival nationalisms, but in mundane administrative grievances spiced with personal ambitions and even with cupidity.

Although those aforementioned elements in the Australian colonies were also very prominent in the American colonies as part of their campaign against the King-in-Parliament, there is little purpose to be served now in highlighting them from the instruction of our American cousins. Professor McMinn continued:

...This is why the demand seemed less impressive to the Colonial Office than it can seem to the modern student, why the Colonial Office was, in fact, less obstinate and more reasonable than is sometimes thought, and why also the system in which a representative legislature confronted an independent executive, apparently on the point of breaking down in 1845, was able to survive in New South Wales for ten more years.

The functions of the Governor were significantly altered with the coming of responsible government. As The Sydney Morning Herald put it:

Hitherto responsible solely for the conduct of legislation – himself the government – he now becomes one of the three recognized Estates. He will surround himself with men whose place and power will depend on support of the Assembly; who, if unable to maintain their position, will be obliged to yield up the staff and make way for more favoured successors...

This was all right as far as it went, but that same leading article was on less certain ground when it continued to deal with what it saw as functional and representational changes in the role of the Governor:

The Governor Sir William Denison has ascended to a loftier position. Formerly the servant of the Cabinet in England, he has become the representative of the Crown.

This would have been an accurate description of the representative function of the Governor-General in a federated Australia some thirty years after its inauguration in 1901 with the enactment by the Westminster Parliament of the Statute of Westminster in 1931, but as a description of the Governor of New South Wales in 1855 or any other Australian governor presiding over a system of responsible government it was 130 years premature. That Governors represented the Crown was beyond question but until 1986 they did not have direct access to the Sovereign as the Governor-General did after 1931; from 1855 they continued to be formally appointed by and continued to deal with the Secretary of State for the Colonies or with whichever Cabinet Minister in subsequent years assumed the functions of that office in relation to the old dominions. Like their Premiers, they did not even have direct access to the British Prime Minister. Until the federation of the Australian colonies in 1901, the role of Governors as agents of the British Government remained significant. As W J Hudson and M P Sharp have expressed it in their excellent study Australian Independence: Colony to Reluctant Kingdom, MUP 1988 (pp. 11-14):

The colonies...did not receive fully responsible government because, however much colonial governors might ordinarily act on the advice of local ministers with the confidence of local parliaments, the governors were also responsible to London, to the government of the United Kingdom. They were Colonial Office officials appointed on the advice of the Colonial Secretary, a United Kingdom minister, and only from the 1880s were colonial governments allowed a voice as to possible appointments. A governor was given instructions by the Colonial Office; he reported regularly to the Colonial Office on the affairs of `his' colony; if he found himself in political difficulties, he looked to the Colonial Office for advice or support. A governor could be sacked by London, but not by a colonial government or parliament... Moreover, even if the colonial governors had been cut adrift from Whitehall, the colonies still would have been left with a second level of dependence because, just as they received less than fully responsible government, they were allowed less than complete self-government even within their own borders.

The second level of dependence was at the legislative level. The colonial parliaments were creatures of the parliament at Westminster, and there were substantial restrictions on their freedom. Thus, for example, some kinds of colonial legislation (constitutional amendment, for one) could not be approved by governors, could be disallowed by the sovereign within a specified period on the advice of United Kingdom ministers. These control devices, reservation and disallowance, were used very sparingly by United Kingdom governments: by the end of the century only fifteen New South Wales bills, for instance, had been reserved for royal assent, and all had received it; of all the bills passed by all the colonial legislatures in Australia to that time, only five had been disallowed [my emphasis]. These devices were used sparingly because London had no interest in unnecessarily provoking the colonies, but also because, by and large,

the colonial parliaments had no wish to provoke London, accepting that legislation on merchant shipping, specie, matters covered by treaties with foreign powers, naval and military discipline, and the royal prerogative must be left to Westminster.
Again, some of the laws affecting the lives of colonists continued to be made at Westminster. In this, Westminster's Colonial Laws Validity Act of 1865 was of central importance...
It might be noted, finally, that colonial parliaments could not legislate with extra-territorial effect: they could not aspire, like sovereign parliaments, to affect activity outside their own borders. As Westminster was usually happy to enact legislation on matters like criminal law enforcement and fisheries when requested by the colonies, this inhibition did not cause much grief. Still, it remains that Westminster had a power which the colonial parliaments did not have, and they did not have it because Westminster did not choose to give it to them.
No doubt it was in a spirit of euphoria that Sir Samuel Griffith claimed at the Australian Federation Conference in 1890 that:
...We have been accustomed for so long to self-government that we have become practically almost sovereign States, States a great deal more sovereign, though not in name, than the separate States of America. We have been given absolute freedom to manage our own affairs.. .
This may well have been a reflection of Griffith's practical experience as a Premier of Queensland, but Tasmania's Attorney-General, Andrew Inglis Clark, at the National Australasian Convention the following year, still felt able to spell out the strictly legal position when he said of the colonies' status with respect to the United Kingdom:
Our real relation to her as dependencies does not depend upon our recognition of the Crown, or upon our appealing to the Privy Council. The great and mighty fact is that our legislative bodies are subordinate to the British Parliament, with their laws liable to be overruled by that Parliament.
But to return to the initial phase of this limited grant of self-government, there were many practical difficulties to be overcome in the local transfer of power from the governors to elected representatives. The party system was not developed and the local leaders were new to political and parliamentary responsibility. Sir William Denison, the Governor of New South Wales in 1855 as already mentioned, a thoughtful and experienced administrator – he had previously been Lieutenant-Governor of Tasmania from 1847 – wrote in a private letter in December 1855 (R M Younger, Australia and the Australians 1982, p.275):
I shall have a good deal of trouble in organizing anything like an effective government, whoever may be at the head; for in these colonies there is but little of the instinct of party. In Victoria, the Government which was installed about three weeks ago has been ejected. I do not think that the persons who have come in to replace it will have a longer existence and amidst this chopping and changing of heads what is to become of the business of the country? It will take some time to teach these political neophytes that the details of work of a government are not picked up in a week or so. In the meantime the subordinates by whom the regular business of the government must be conducted, who are to all intents and purposes irresponsible, will have the charge of what people choose to term a "responsible government".
Sir William's forebodings were fully vindicated. From June 1856 to January 1861, New South Wales had six Ministries, as had Victoria, and Tasmania and South Australia had five apiece. In Victoria's case, even the emergence of political parties did not significantly alleviate this instability until 1955 when the Country Party ceased to be a significant force. The end to what the late Professor A F Davies called "the baroque period of Victorian politics" was sealed in a constitutional crisis in 1952 when for the second time in five years the Legislative Council blocked Supply, this time in an attempt to impose a programme of electoral reform on the Legislative Assembly. An election for the Assembly was called after two changes of ministry

and the electoral redistribution was subsequently legislated into effect by a triumphant Labor Party. In the wake of this crisis a note dated 1 November entitled "Political Parties in Victoria" was issued from the Commonwealth Relations Office's Political Affairs Department. Be it noted that State Governors were still reporting to a member of the British Cabinet, in this case the Secretary of State for Commonwealth Relations. There is a suggestion in this note of Gulliver's lofty contemplation of the antics of Lilliputians:

In the State's 96 years of responsible government there have been a significant number of political crises, strange alliances and party somersaults, in the course of which the State has had 58 ministries, 17 of them in the past 30 years.

One of the prerogative powers is the right available to the Crown of granting or withholding a dissolution. In the words of the late Professor John Mackintosh, "There was, both then and since, considerable confusion about the circumstances in which the King or Queen could refuse a dissolution". I shall not weary you trying to sort out this confusion in the context of the United Kingdom because there appears to have been no such confusion in the Australian colonies (later States) or indeed in the Australian Commonwealth. Australia's third Governor-General, Lord Northcote, refused a dissolution on two occasions in 1904 and his successor, Lord Dudley, felt under an obligation to do the same on another occasion in 1909.

These refusals were mentioned by Don Markwell, Fellow of Merton College, Oxford, in a letter to The Times of 9 April this year commenting on an article in the previous day's Times by Lord St John of Fawsley, Master of Emmanuel College, Cambridge, on the Queen's role in a hung Parliament. Lord St John had claimed that in no circumstances would the Queen refuse an incumbent Prime Minister's request to dissolve the House of Commons. Markwell contested this claim and recited in the British context the circumstances in which as it happens Australia's surrogate royals have refused dissolutions:

On the contrary, if a prime minister had clearly lost the confidence of the Commons, for example in a vote on some vital issue, and it were clear beyond reasonable doubt (e.g., through a cast-iron agreement between parties making up a majority) that someone else could command its confidence, then the Queen would be acting in accordance with constitutional principle and precedent to refuse a request for dissolution from the incumbent prime minister and, upon his resignation (which would naturally follow), to ask the leader who clearly had the confidence of the Commons to form a government.

As it happened, on that very day all speculation concerning a hung Parliament was confounded by the Conservative Party's convincing victory at the polls, but the principles stated by Markwell still hold in the context of Australian constitutional practice. A dissolution was last refused in Victoria in October 1952 by General Sir Dallas Brooks and the most recent instance of such a possible refusal was in South Australia in April 1968 when Lieutenant-General Sir Edric Bastyan, on Don Dunstan's resignation, commissioned Raymond Steele Hall as Premier. Sir Edric Bastyan shortly afterwards became Governor of Tasmania and on completing his term there in 1973 returned to Adelaide to live in retirement. There might well have been a refusal of a dissolution in Tasmania in 1989 if the then Premier, Robin Gray, had sought one from Lieutenant-General Sir Phillip Bennett. Instead Gray chose to resign to enable the Governor to send for Michael Field.

But I am getting ahead of myself. The coming of responsible government meant that the immediate burdens of administration were lifted from the shoulders of the governors and were assumed by responsible ministers even if, in the politically unsettled climate of the time, those same ministers seemed like "transient and embarrassed phantoms". Conformably with this change there were fewer vice-regal appointments of senior naval and military officers, although such a line did not become extinct: such appointments are indeed still made at State level. But, as

if to emphasize that the office had taken on a more ornamental than strictly functional role, at least on a day-to-day footing, aristocrats were appointed to vice-regal office in significant numbers in the latter half of the nineteenth century. Perhaps by virtue of its isolation and the fact that responsible government was not ceded to it until 1890, Western Australia failed to score a peer of the realm. Tasmania scored two widely separated ones in Viscount Gormanston from 1893 until 1900 and Lord Rowallan from 1959 until 1963, and South Australia likewise, but with a shorter period separating them, in the Earl of Kintore and Lord Tennyson, the son of the Poet Laureate. Queensland scored three in the second Marquess of Normanby, who then moved to New Zealand and then to Victoria, Lord Lamington and then Lord Chelmsford, who subsequently moved to New South Wales. Victoria scored four in the nineteenth century in Sir Charles Manners-Sutton who succeeded his brother to become the third Viscount Canterbury during his term, Lord Normanby, as I have already mentioned, the Earl of Hopetoun, who after a spell as Lord Chamberlain in Queen Victoria's Household returned to Australia as its first Governor- General, and Lord Brassey. Victoria saw a revival of aristocratic appointments in this century with the appointments of the Earl of Stradbroke, Lord Somers and Lord Huntingfield. In 1949 Major-General Sir Winston Dugan, who had moved to the vice-regal post in Victoria from South Australia in 1939, was created a baron on completing his term; a barony was also conferred on his successor in Adelaide, Sir Willoughby Norrie, on the completion of his subsequent appointment as Governor-General of New Zealand.

In New South Wales, the aristocratic line, which was broken more than once, began in 1861 with the appointment of an impoverished Irish peer, the fourth Earl Belmore, who was to give his name to a Sydney suburb, a park and sundry streets. Lord Belmore was succeeded by Sir Hercules Robinson who in turn was succeeded by Lord Augustus Loftus. Lord Augustus was succeeded by Lord Carrington, the original "Champagne Charlie" it is said, and he was succeeded by the Earl of Jersey. The aristocratic succession was restored with the appointment of Viscount Hampden who was succeeded in 1899 by the seventh Earl Beauchamp. He was the model for Lord Marchmain in Evelyn Waugh's novel Brideshead Revisited. Lord Chelmsford has already been mentioned as a twentieth century aristocratic appointment in New South Wales, the first since Lord Beauchamp. The last imported Governor of New South Wales was also a peer, Lord Wakehurst. After he had been involuntarily removed from the House of Commons on inheriting his father's barony, Lord Wakehurst took the option of Hilaire Belloc's lachrymose Lord Lundy and went out to govern New South Wales.

The federation of the Australian colonies established another vice-regal office in the Governor-Generalship but, before I discuss that office in any detail, I should like to quote the views on it expressed by Sir Samuel Griffith, not only for their intrinsic worth but in the light of our honouring him by inaugurating this Society in his name. Speaking to an amendment moved at the National Australasian Convention of 1891 by a New Zealand delegate, Sir George Grey, to the effect that the Governor-General of the proposed Commonwealth of Australasia should be elected, Sir Samuel made the following statement which I now propose to quote in extenso:

..I am, to a great extent, in sympathy with the object desired to be attained by Sir George Grey. I believe the highest offices of the state ought to be open to its own citizens; but I do not think it follows that the necessary way to bring about that result is to provide that the Governor-General shall be directly elected by the people. Probably the greatest difficulties which have arisen in the United States are owing to the manner in which the President is there elected. If you have a direct election of the President by the people, or such an indirect election as has been substituted for it there [per medium of the Electoral College], the practical result would be that at every election of the Governor-General there would be a canvassing throughout the whole dominion or Commonwealth by the representatives of respective parties, and the Governor-General, when

elected, would regard himself as the nominee or head of a party, and would devote a great part of his time and attention to securing his re-election. These are not the objects which the hon. member, Sir George Grey, desires to attain. I am inclined to think that this is one of those matters that will work out by itself. I am much inclined to think that before many years are over not only the Governor- General, but the governors of the different Australian colonies, will practically be appointed, not, perhaps, by direct election, but with the full consent and concurrence, known in advance, of the people of these colonies. I believe the tendency is strong in that direction at the present time... I believe it will be to the interests of the Government of England to appoint the best men, men acceptable to the people of the Commonwealth, and that they will exercise all proper care to bring about that result. I have no doubt, especially considering the greatly altered conditions of the Commonwealth, that great weight will be paid to the wishes of the people, and that some means will be found of nominations being made, if not directly by the Australian Commonwealth, yet under such circumstances as to secure appointments which would be known to meet with the concurrence of the people of these colonies. I am of that opinion; I cannot say how it will work out in detail. I believe, also, that when the people of Australia are of opinion – and surely an opinion may be shown in other ways than by an Act of parliament – that it is desirable that a distinguished Australian should be appointed to the office of Governor-General, some instances will be found – if, indeed, the course is not invariably adopted – in which distinguished Australians will be appointed to the position. That, I take it, is all that the hon. member, Sir George Grey, desires to attain; and it can, compatibly with the retention of our relations with the Crown, be attained by leaving the appointment as it is proposed to be left, in the hands of the Queen.

The views of Sir Samuel that the Governor-General should be appointed, not elected, carried the day then and in the final instrument according to which the Australian colonies federated but without New Zealand as an original State. But it is, I think, worth quoting with suitable editing the views of Alfred Deakin as expressed in that same debate:

...I should be loath to say a single word that would appear to derogate from the great dignity and honour attaching to the office of governor of one of the colonies, and much more to that of the Governor- General of Australasia, a most high, and honourable, and dignified position. But is it a position to which any number of people of the colony are ever likely to aspire? In my opinion there is nothing in it to arouse the ambition of those who claim to stand on the liberal side of the community. What they seek, if they seek anything, if their ambition is a worthy one, is to give effect to the principles in which they believe – to be able to do something, to strike some blow, to be able to do some deed which shall establish their principles in the government of the country. What can a governor or a Governor-General do to give effect to the highest principles which he holds? Nothing. What do his convictions count in a country such as this is and will be? He may cling to his principles with an ardour and devotion equal to that of any other man, but he of all men in the community is the one who is debarred from the privilege of doing anything to advance them. Setting aside the tacit, the silent, personal influence which such a man inevitably exercises upon those who surround him, he is as much removed from the interests and the future of the country in which he lives as if he were still a resident of the mother country. What we say is, therefore, that the ambition of the democracy of this country is an ambition to shape its laws, to guide its destinies, to widen its opportunities, to make life in this country better worth living than it has been hitherto. For this purpose the position of a representative in any of these colonies is infinitely superior to that of Governor-General. We say that any man who has received his authority direct from the people, who is commissioned to devote his abilities to great tasks, and who joins his fellowmen in performing public duties, fills a position, politically, far higher than the post of social distinction occupied by the Governor-General. When the hon. member points

to the splendid example of Lincoln, the hero of America, his proposal to make such a man a governor or a Governor- General, is almost grotesque. Lincoln exercised powers such as will never be possessed by any Governor- General. If we have any Abraham Lincolns in this country who desire to fulfil the same destiny, the position of Governor-General is the very last into which we should put them. If we ever possess a man of his rude, rugged magnificent nature we should not offer him an office of this kind which, indeed, he would not deign to accept, because he would feel that in it his splendid powers would be wasted. What should we do with such a man? I trust that we should make him premier of Australia; and I should say then that he was filling the office for which he was fitted, that he had stepped into the position in which he could best employ all his ability, that he had found the worthy object of his ambition, and that he could fulfil his own destiny and the destiny of his people. It is because... we cannot see that the office of governor or Governor-General is one so much to be desired by those who take the democratic view of it... that we feel so little concern about the matter... To make... the office of Governor-General... an object of ambition you must change its character altogether, and make it an office like that of the President of the United States - a high executive office in which a man can carry out his ideas and give effect to his principles. If he becomes a personage in the political life of the country, his office must be elective... At the present time we say that the Governor- General exercises... the power of the Sovereign of Great Britain, and no more than the people of Great Britain feel degraded and limited, because no one there can hope to aspire to be the monarch of that country, do we feel degraded and limited because we cannot aspire to be Governor-General... We feel no regret through being debarred from this one ceremonial office...

It is only recently that the office of Governor-General of the Commonwealth of Australia has been the subject of sustained interest on the part of scholars and commentators. Just as Dr H V Evatt's study of the reserve powers, The King and his Dominion Governors, was inspired by the events surrounding the dismissal of the Premier of New South Wales, J T Lang, in 1932 by Air Vice-Marshal Sir Philip Game, the arousal of interest in the Governor-Generalship was due to the events of 1975 when the Governor-General, Sir John Kerr, dismissed the Prime Minister, Mr E G Whitlam, for the purpose of ending an inter-House deadlock over Supply which bore many similarities to a couple of such deadlocks in Victoria in 1947 and 1952, but with this important difference: in each case in Victoria all parties ultimately conceded the need for an election. I should add that I have never entertained a moment's doubt as to the constitutional correctness and propriety of Sir John Kerr's action in withdrawing Mr Whitlam's commission. Sir Zelman Cowen, who succeeded Sir John Kerr in that office in 1977 and relinquished it in 1982 to become Provost of Oriel College, Oxford, contributed a chapter on the office to Australia: the Daedalus Symposium published in 1985 claiming that it would not have been likely that before 1975 such a volume would have included an essay on such a subject. The following statement is quoted from that essay:

The office of Governor-General made its appearance within a federal constitutional structure in which there were already six governors of the federating colonies that became the States. In the debates preceding federation, the possibility of dispensing with State governors was canvassed, but State wishes to preserve these offices prevailed. So it was that the relationship of the Governor-General to State governors had to be determined. The title "Governor-General" suggests a supervisory or superior authority, and when the first Governor-General of Australia (who had earlier been a governor of Victoria [the Earl of Hopetoun]) sought to establish this by requiring State governors to report to the United Kingdom authorities through him, he met strong resistance on the part of State governors, and they sustained their positions. So it is established that State governors do not answer to the Governor-General. In practical terms, then, the title of Governor- General matters primarily for purposes of ceremony and precedence. There are cases

when State governors inform the Governor-General of State action, but this is for convenience, and as a matter of courtesy, not of obligation.

From this quotation one can find ample support for the claim by Hudson and Sharp (p. 28) that in drawing up a federal constitution "the colonists were concerned mainly to change intra-Australian relationships rather than the imperial relationship". The concluding paragraph of their chapter "Federation" reads:

What federation achieved was the potential for the independence of an Australian nation state. Once formed, the federation might become independent, and there could be virtually no prospect now of several independent states in Australia along Latin American lines. That was the profound significance of federation. Australia in 1901 was a colonial federation which might one day become an independent federation. The Australian federation was not independent in 1901.

Although a one-time High Court justice, Sir Victor Windeyer, ambiguously called the Commonwealth Constitution "the birth certificate of a nation", there was nothing ambiguous in his treatment of Australia's colonial experience in his 1977 Commonwealth Lecture at Cambridge:

The Australian Colonies had all begun as `settled colonies' in the legal sense, truly colonies in a linguistic sense – that is to say they were places that, in Blackstone's words, had been `planted by English subjects', a colony being defined by Doctor Johnson as `a body of people drawn from the mother country to inhabit some distant place'. Australians of past generations were proud to belong to a self-governing British Colony. Only in recent times has the word `colonial' become a pejorative misnomer for rule by a foreign power, so that, in the jargon of today, `de-colonization' means independence [from that foreign occupying power].

I feel that these sentiments cannot be re-iterated often enough to counter the recourse by latter-day Australian nationalists who, in describing and defining their country's colonial experience, have recourse to the rhetoric of Third World countries with a history of foreign rule. This demeaning falsification of the record plumbed the very depths of absurdity in a reported claim by the Prime Minister, Mr Keating, during his first visit to Indonesia as our head of government, that Australians could understand the struggle of Indonesian nationalists for independence from the Dutch in the light of their own "struggle" against the British.

Australia's Governors-General from the Earl of Hopetoun to Sir Isaac Isaacs have been the subject of an interesting study by Dr Christopher Cunneen entitled Kings' Men, (Allen & Unwin) 1983. In reference to Lord Hopetoun, Dr Cunneen wrote of his "dual role" in representing the Crown in the Commonwealth of Australia. Sir Zelman Cowen spelt this out in broad terms as follows:

The early Governor-Generals saw themselves, and were seen by the British and Australian governments, as charged with dual responsibilities... as "both local constitutional monarch and imperial diplomat". The discharge of these two roles was not always easy; a Governor-General of Canada explained – it may be complained – "a colonial governor is like a man riding two horses in a circus". In one aspect, the Governor-General performed the role prescribed by the law and custom of the constitution; in the other, he was the principal representative of the British government in Australia and, as such, was a protector of British and imperial interests. Thus, such matters as immigration and tariff policies were of special concern to the United Kingdom government and so too were defence and foreign affairs. The Governor-General reported to the United Kingdom government and communications between the Australian and the United Kingdom governments were passed through the office of the Governor-General.

This arrangement was to persist until 1926 when, during the term of Lord Stonehaven, the Balfour formula on imperial relationships left the Governor-General confined to the functions of a local constitutional monarch and relationships between Britain and the self-governing

dominions came to be handled though exchanging high commissioners. The Balfour formula was devised at the Imperial Conference of 1926 although something like it had been foreshadowed at the 1923 Conference chiefly at the instigation of Canada, South Africa and the Irish Free State. It was to have its full flowering in the Statute of Westminster of 1931. Hudson and Sharp, who have dated Australia's effective independence from that Act's proclamation in 1931, have recounted how the Australian Government was less than enthusiastic about these steps at the time. This apparent lack of interest was noted by the Australian correspondent of Round Table, but he explained that the Australian attitude towards Imperial relations was neither frivolous nor indifferent. Rather Australia was "... not interested in the dogmatic assertions of equality of status, for it has not been conscious of any inequality and considered that Australia was perfectly secure in whatever status it wanted". Secure in status Australia might have felt but her concern for security in an international environment was far greater than that of the proponents for a redefinition of Imperial relations, hence her uneasiness at any formula which might in the immediate term weaken the unity of empire. There was a consistency of view on this subject upheld alike by William Morris Hughes, Stanley Melbourne Bruce as Nationalist Prime Ministers and by Bruce's Labor successor James Henry Scullin, although the latter's attitude has been obscured by his insistence at the Imperial Conference of 1930 that King George V should depart from precedent and for the first time appoint to the Governor-Generalship a native-born Australian in the person of Sir Isaac Isaacs.

As you are all doubtless aware, Isaacs's appointment did not end the practice of importing Governor- Generals from the United Kingdom, but the decisive factor influencing such appointments was the attitude of the Australian Government. The governments of Canada, South Africa and New Zealand henceforth also exercised the same influence in the matter of their vice-regal appointments. Sir John Colville, at the time a private secretary at 10 Downing Street, wrote in his diary on 5 January 1940: [The Fringes of Power: Downing Street Diaries Volume One 1939-October 1941,] "Lord Bledisloe [Governor-General of New Zealand 1930-35] has written to ask the P.M. for the Governor-Generalship of Canada. It is extraordinary how shameless people can be". But it is clear that Lord Bloody-Slow, as King George V had nicknamed him, had sent his importunate letter to the wrong address. On the recommendation of Canada's Prime Minister, William Lyon Mackenzie-King, the appointment as Lord Tweedsmuir's successor went to Queen Mary's younger brother, the Earl of Athlone.

Sir Alexander Hore-Ruthven VC, as Governor of New South Wales, was more astute than Lord Bledisloe: he commended himself as Sir Isaac Isaacs's successor as Governor-General of Australia to Dr (later Sir) Earle Page, Australia's Acting Prime Minister in the absence of J A Lyons, at King George V's Silver Jubilee celebrations in London. In the event, Hore-Ruthven obtained the appointment in 1936 as a newly created baron, Lord Gowrie; whether Gowrie's appointment to Yarralumla was because of or in spite of his earlier approach to Earle Page, I do not know.

Although Australia showed no haste in adopting the Statute of Westminster, from 1931 the United Kingdom acted as if she had, to this extent that the United Kingdom government only acted with respect to Australia after consultation with the Australian government. In 1937 at his Coronation King George VI did not swear the same oath as King George V at his Coronation in 1911, but one revised after consultation with the Dominion governments to take account of the change in Imperial relations. This Oath acknowledged the standing of the Old Dominions as independent kingdoms owing allegiance to the Crown in the person of the Monarch. On Australia's adoption of the Statute of Westminster, Sir Victor Windeyer had this to say:

In 1942 when Mr Curtin, leader of the Labor Party, was the notable wartime Prime Minister, the Australian Parliament passed the Statute of Westminster Adoption Act. This brought provisions

of the Statute – sections 2, 3, 4, 5 and 6 which had not previously extended to Australia – into force there as from the date when the war began. The purpose was, as the Act stated it, to remove legal difficulties which had created doubts as to the validity of Australian legislation enacted `for securing the public safety and defence of the Commonwealth of Australia and for the more effectual prosecution of the war in which His Majesty the King is engaged'. Thus the Statute of Westminster was made applicable to Australia – not as an assertion of independence or a severance of Imperial ties, but by the exigencies of Australia's participation as a British Dominion in war.

It was not until the passage of the Australia Acts 1986 that the Australian States were brought within the scope of the Statute of Westminster: that particular legislation severed all formal links with the British Parliament and government leaving the Crown as the only link between the two countries in the person of a shared Monarch. In 1953 the Australian Parliament passed the Royal Style and Titles Act to acknowledge Queen Elizabeth II's standing as Queen of Australia. In 1963 the Queen adopted a distinct standard to be flown whenever she was in Australia discharging her responsibilities as its Queen. In 1973 Australia's Royal Style and Titles Act was amended to delete any reference to the Queen as Queen of the United Kingdom. The upshot of all this is that Australia, like Canada, New Zealand, Papua and New Guinea and others, shares a Monarch with Britain in much the same way as England and Scotland shared the same Monarch as independent kingdoms between 1603 and 1707 and as Great Britain and Brunswick-Luneburg (more commonly known as Hanover) as independent states between 1714 and 1837. It is because of this very pertinent historical analogy that I am unable to see any anomaly in Australia having a non-resident Monarch whose functions in her absence are discharged by a Governor-General in respect of the Commonwealth and by Governors in respect of the Australian States. It is now the case that all Australian vice-regal appointments are native – born or naturalized Australians, as Sir Samuel Griffith had predicted in 1891. I should add, however, that Sir Henry Bolte (Premier of Victoria 1955-72) once told me that he personally had steadfastly resisted dispensing with the policy of importing Victorian governors in favour of Australian vice-regal appointments because he did not have to shell out as much as one cent from the Victorian Treasury for the pensions of governors imported from Britain; those he could safely leave to H.M. Treasury in Whitehall. I should add that those Australian republicans who imagine that the republic of their yearnings would be a cost-effective arrangement might be in for a rude shock. Sir Henry also gave me an amusing account of the process of selection of a successor to Sir Dallas Brooks who had been Governor from 1949 until 1963. At the invitation of the Secretary of State for Commonwealth Relations, Duncan Sandys, he arrived at a reception in London at which a crowd of contenders had been mustered by the Commonwealth Relations Office like so many bulls being herded into a paddock prior to having their points judged. Bolte was not impressed by any of them, said as much to Sandys, and then went on a hunt of his own. Ultimately he personally selected Major-General Sir Rohan "Jumbo" Delacome, the recently retired G.O.C. in the British Berlin Sector.

The telegraphic link with Australia was opened in 1872. The Australian colonial writer, Francis Adams, noted sourly that the "mail steamer and cable have brought England too close". It is with some amusement, therefore, that I note the oft-repeated assertion by our latter-day republicans that our present Head of State is too far away: this, be it noted, is asserted in the age of satellite communication and of intercontinental jet travel which can bring the Queen to Australia faster than any Stuart monarch could have travelled from London to Edinburgh or any Hanoverian monarch up to 1837 could have travelled between London and Hanover.

There remains, however, the debate on Australia' s future as an independent kingdom. I do not wish to trespass on the allotted territory of Bruce Knox, who will be dealing with the republican debate shortly in a paper of his own. But I should mention certain factors which should not be

overlooked. At present our Governor-General and our State Governors are appointed by the Queen on the recommendation of the head of government, be that Prime Minister or the State Premier. It is hard to see how an arrangement in a purely local sense – effective appointment of the Head of State by the head of government - could survive a change to a republic, even though a recent editorial in the Canberra Times has urged that it should. Some form of election would be insisted upon, and yet the elective process would not broaden the range of distinguished citizenry from which such appointments could be made. In fact the range of choice would be narrowed. Once an elective process is decreed for our Head of State, however broad or narrow that constituency might be, the office of Head of State will be cornered by our politicians with the invariable outcome of one of their own getting the appointment. I say this confidently because I am not aware of any other republic with a Head of State substituting for a constitutional monarch where this has not been the case. Consider, if you will, the French Third and Fourth Republics, the Federal Republic of Germany and the Republic of Italy as it has functioned since the exiling of the House of Savoy. In this context, I am reminded of some statements by the Chairman of the Australian Republic Movement, Mr Thomas Keneally, who, it must be said, is not niggardly when it comes to providing comic relief. When first asked to comment on the type of person he would like to see as Australia's first President in the event of his dreams in this connection being fulfilled, he suggested a possible choice between Geraldine Doogue and Ita Buttrose. Even if either identity could be considered a suitable candidate for such a position, neither one would have a snowball's hope in hell of getting it in view of the certainty of that position going to a politician. Since that initial statement Mr Keneally has given us a further statement on the subject in the form of "Home Thoughts from Abroad", for he had declared himself in London. Now, it appears, he hopes Australia's first President will be an aboriginal woman, an outcome as unlikely as his earlier expressed hope unless aboriginal women in the meantime break into politics in large numbers. There was such a tokenistic patina to this, Keneally's latest lead ballon d'essai, that I was irresistibly reminded of that Barry Humphries character Phil Philby, an Australian film maker who won the Gold Goanna (or was it the Bronze Scrotum?) for a film entitled "Cage of Darkness" which dealt with "discrimination against lesbianism in an aboriginal women's prison".

Now I do not know how Senator Rod Kemp's party, which is at present opposed to a republic, would comport itself in any process of election for a republican Head of State if what it now opposes came to be established. But we do have some scope for judging how the Labor Party, which has adopted republicanism in its official policy, would approach the matter. If one is to judge from the operation of factions in the election of members of Labor Ministries, we would have to draw certain conclusions. It has become clear that inter factional trade-offs have not served consistently to raise suitable appointments or even presiding officers from the back benches. If the party can show such scant regard for one of those organs of state which the nineteenth century writer, Walter Bagehot, in his classic The English Constitution, designated as an "efficient" part of the Constitution, can we expect that same party to show a more sensitive appreciation of the office of the Head of State which Bagehot identified as one of the "dignified" parts of the Constitution?

Sir Robert Menzies once said "that to get an affirmative vote from the Australian people on a referendum proposal is one of the labours of Hercules". How much more so will it prove to be in effectively rewriting both Commonwealth and State constitutions to convert this country into a republic. It seems to me to be even more unrewarding when the practical objective in contemplation is to empty our Government Houses of surrogate Royals and replace them, duly vested with republican prefixes, with a collection of cretinous factional clones. At this point I would recommend a reading of the statements by Griffith and Deakin in 1891 which I quoted earlier in this paper. Constitutional reform, if desirable, should be directed to a more edifying

goal, in both a practical and in an inspirational sense, than making available some grace and favour mansions during the term of office and then some non-contributory pensions, to augment their already accumulated and substantial superannuation entitlements, as a form of severance pay to this nation's Leaping Leos.

Chapter Ten

Fantasies and Furphies: The Australian Republican Agenda

Bruce A Knox

In the most recent issue of Quadrant, John Hirst of La Trobe University sets out cogently and convincingly the reasons why we should take care to study and keep in mind the British origins of Australian society, and that we should beware of those who think that to establish Australian independence it is necessary to deny our British heritage. At the end of the article however he surprises his readers by saying that he is a republican and does not believe that it is necessary to maintain the Queen in order to preserve our political and cultural heritage. John Hirst's views on the subject of republicanism were set out at some length in an earlier issue of the same journal. In all essential respects they were emulated yesterday by Frank Devine, and I have to say that they are the only statements of a republican case which seem to me to be at all convincing. I don't say they do convince me, but they are far from contemptible.

Hirst is the Victorian convenor of the Australian Republican Movement (ARM). His "conservative case for a republic" is a sophisticated argument, turning chiefly on the situation created by "multi- culturalism". I find myself in a difficulty with it, because I agree in pretty well every respect with J. Hirst's unease about multiculturalism. With one of his assessments however I must fundamentally differ. It is precisely the notion that the Australian version of constitutional monarchy is so far bereft of authority and influence that our only hope of reviving a convincing civic spirit is to replace it with a newly minted republic. In Hirst's view, this would enable the divisive consequences of multiculturalism to be overcome by a new focus of loyalty. Frank Devine yesterday suggested that the Australia Act, 1986 had deprived the Queen of any function in Australia, and that her residence at such a distance, surrounded by a host of odd relatives – he seemed to find more than I ever imagined! – rendered her increasingly alien to Australians. He therefore doubts, not perhaps without regret, whether the monarchy can survive. What he omitted to mention was the earnest and sustained efforts of ARM and their ilk to "educate" the Australian people in such an opinion, by providing for them a barrage of what I have called (in the title of this paper) fantasies and furphies. One such furphy is, of course, the existence of the extended royal family, whose vagaries are only tangentially associated with the institution of monarchy and whose costs (something which anti- monarchists in Britain at least make much of) have no impact whatever on Australia.

My paper, then, is not friendly to the advocates of an Australian republic or to their arguments. I believe that in general they do us a disservice, not by raising the question – for discussion and debate never ultimately does harm in a society such as ours (or so I have always supposed) – but by making out that the establishment of a republic is essential to the future stature and fortunes of this country. I happen to believe that, if anything, precisely the opposite is the case, and I'll be having something to say to that effect. They typically argue also that their case is "logical" and that opposition to it is based, not on reason but emotion. To this also there is an answer.

So I must enter the caveat that I don't for one moment question the authenticity of republican sentiments. It is easy – and, to a large extent, I suspect accurate – to assume that Mr Keating has rather more than philosophical conviction in his mind to inform his various republican and quasi-republican utterances over the last few months. But it won't do to dismiss the Australian

Republican Movement simply in such terms. It has a long ancestry, and republicanism has its claim to moments of distinction, even triumph. One of its most spectacular failures however happens to be in this country. It has never got within "coo-ee" of success, unless – if one could be permitted a touch of pessimism – one were to say that its chances seem at present to have picked up.

But this leads of course to a significant criticism of the ARM. It claims to be a response to present and future conditions. In fact, it is much more like a conglomerate of long-standing notions of civil government and national destiny, which are not called into existence by our present condition, but the proponents of which see our present condition as offering them an unprecedented opportunity. The aims and arguments should be recognised in these terms. At best they might be considered an intellectual indulgence which, as much as anything, represents an attempt to impose on us all a view of history which has much to do with "what might have been". There are less reputable possibilities which I'll come to in due course.

Let me then suggest first of all what I see as the chief antecedents of contemporary republicanism, for this authenticity deserves to be made clear. One would hardly suggest that there is a consistent or uniform philosophy or idea – witness the article on the rival republican movements which appeared in the newspaper this very day – but it would be surprising if the chief movers were not conscious of being able to claim a descent from the mid-seventeenth century. The conflict between Crown and Parliament at that time issued in civil war, at the end of which was established a regicide Commonwealth. It had its apologists, and its legacy was considerable, not least in the contribution it made, via the "Glorious Revolution" of 1689, to the ideology of the American Revolution. That in turn stood before the British mind, metropolitan and colonial, as a demonstration of what, perhaps, might be the destiny of colonies. Equally however our republicans must be aware of the French Revolution as perhaps the greatest single influence on the course of modern European political history. Its murderous tendencies are well known, and the execution of Louis XVI in 1793 declared more emphatically than almost anything could that kings and their appurtenances were dispensable.

It is of course a mistake to suppose that the French Revolution was without an effect in England and on English radical opinion. Tom Paine, author of The Rights of Man in 1792 was but the most obvious of those who celebrated what the French had done and sought to translate it to English circumstances. I'll mention this again later in a different context, but the important thing to observe is that republicanism became well and truly entrenched as an English phenomenon, albeit driven underground for most of the time. Philosophically, again, one of the most potent intellectual influences on our modern society and government was Jeremy Bentham, whose devotion to law "reform" predicated a political constitution in which the monarchy had no place. His eminent disciple, James Mill, imbued Utilitarianism with, surprisingly enough, a more tolerant approach: to him, as to his more famous son, John Stuart Mill, it was of no consequence whether an improved society were a monarchy or a republic. But it is clear that the climate of ideas to which such writers contributed was less and less sympathetic to what could, not least in the early and middle nineteenth century, be regarded as a survival from an age which was, happily, past. The personal characters and behaviour of King George IV and even the fairly harmless William IV were no help to their order. Even Queen Victoria, the paradigm of virtuous monarchs, encouraged the prejudices of an increasingly secular age by her self-imposed seclusion for a decade after the death of the Prince Consort. The result was that probably the high point of English republican tendencies was reached in about 1870.

We should note that this was the very period in which the greater British colonies were reaching a high point of independent confidence. It is true that the business which completed the creation of the Dominion of Canada gave much cause for optimism, but, in contrast, relations between the

British government and the Australian colonies were unprecedentedly troubled. Probably it is not too much to say that there was a crisis of empire – and thus of constitutions – short of rebellion, but more serious otherwise than anything which had occurred since the American war of 1776-83. Opinion in these colonies was fed by various streams: emigrant Chartists from Britain, Irish malcontents, American gold diggers, and so on. The termagant Dr J D Lang, intent on recreating something like a Calvinist paradise in these parts, had written his Freedom and lndependence for the Golden Lands of Australia as early as 1849 (I think!); and, though he contributed much to the life of New South Wales and Queensland, he missed the offer of a knighthood in the Order of St. Michael and St. George by publishing his The Coming Event in 1871, just when the British government was intent on avoiding the appearance of giving approval to colonists who appeared to advocate the dissolution of the empire.

Republicanism was undoubtedly in the soil of Australia at this time. The surprising thing is that it failed to flourish, even under the stimulus of journalistic and literary encouragement in the last twenty years of the century, when incipient isolationism and Utopianism – not to mention the narcissism which is surfacing in these days – were exemplars of the true "tyranny of distance". A view was forming that the maturity and potential of Australia, before and after federation, was inhibited or compromised by the lack of what its proponents would be pleased to call "independence". By this is meant the fact that the Australian colonies and the Commonwealth of Australia did not separate themselves from the empire and achieve, under the auspices of a republican form of government, the Utopia which "might have been": which might, one could say, be exemplified by the starry-eyed characters who set out in the last decade of last century to establish their ideal in Paraguay. It is a tribute, I suggest, to the remarkably outward-looking character of the Australian populations that the phenomenon was driven to cover by the recognition of Australia's place in the world, exemplified by participation in the Boer war – which was not the unnatural role which "Breaker Morant", that epitome of cinematographic dishonesty, would have us believe – and World War I. This does not, of course, overcome or eliminate, or suggest that there does not exist, a view of the monarchy which is not based in isolationism, chauvinism or narcissism, but in the older radical tradition held in common with republicans elsewhere.

The republican aspect of the "Australian Legend", in its contemporary implementation, might turn out – for whoever can tell? – to be vindicated eventually. I must urge however that it can be answered.

There is a view of the development of our parliamentary institutions which I'd urge our republicans to consider. It sustains a "logic" for the maintenance of constitutional monarchy in Australia just as valid as that which insists, for example, that because the Queen is not "Australian", so also the institution is not "Australian", and that, because Britain is increasingly dissociated from this country, so the monarchy becomes "irrelevant". It runs as follows – and I must ask indulgence for the compression which time imposes, and the crudities which are its consequence. In our case, continuous with that of Great Britain, the Crown has been integral to the process, so that parliamentary government is synonymous with constitutional monarchy. I must emphasise the "our". Colonial "responsible government", the basis and pattern of our present system, was not some sort of alien imposition on post-1788 Australians. On the contrary, emergent indeed from the common stock of British colonial experience, it was sought by ambitious colonists and, once established, was self-developed over a period of some 150 years by constant and creative interaction of local with imperial factors. Yet to hear some republicans, it would seem that we were a race subjected by invaders – and I am conscious that the cruel resonances which this must have for Aborigines are outside the scope of the present discussion – and held down by force or guile.

This is a possible self-image, however misleading, for some present day societies, but emphatically not for us. My view, as an historian and as an individual, is that we can do ourselves no better service than to remember that the colonisation of Australia, in its political dimension especially, has absolutely nothing in common with the experience of countries in Asia and Africa which in the second half of this century have enjoyed the dubious benefits of "de-colonisation". We are the beneficiaries of "colonialism", not its victims: indeed, we are the colonisers, and little purpose is served by concealing or ignoring the fact, or, for that matter, wallowing in guilt on account of it. Less obviously, but perhaps even more importantly, our experience has very little to do with what shaped the character and destiny of those English colonies which became the United States.

I've been intrigued in this connection by David Neal's recent book, The Rule of Law in a Penal Colony. Law and Power in Early New South Wales. His main theme is that the inhabitants of New South Wales, practically from Day One, applied to their new circumstances a political-cum-legal view of society which derived directly from a central, perhaps dominant, feature of the eighteenth century English mainstream: i.e., the Rule of Law and all that it implies. This accords with my argument entirely. Neal's book helps to confirm that the origins of the Australian polity are to be found in continuous association with the institutions, as well as the ideas and practice, of Great Britain. The French and American examples which were available by the end of the eighteenth century, were – as it would seem – deliberately avoided, by convicts, ex-convicts, and free settlers alike. I suggest that it is wholly inappropriate to try to create in the present day a quasi-revolutionary tradition which has little or no authentic ancestry in the formative years of European Australia. To say this is by no means to abandon either logic or reason, but to build on a properly sustainable view of our history.

The European intrusion into this continent was naturally accompanied by certain governmental structures and modes of exercising authority. They were at all times liable to be modified by transmission from the metropolitan political culture which produced them, and in response to colonial necessities. After 1815 – and even more after 1819 – it was inevitable that they would be. Especially, the immense constitutional and political changes in Britain during the 1830s, the consciousness of these in New South Wales (not to mention Canada), and the changing economic and demographic circumstances of the colony, pretty well determined the direction which would be taken.

The result by the mid-1850s was the establishment of parliamentary government, not without some hesitation on the part of those in England who had responsibility for monitoring the affairs of colonies. And the new system was entirely under local control, save, of course, for anything which smacked of extra- territoriality. It at once exhibited local peculiarities. But let us be clear. Here was an authentic case of institutional transference and adaptation. The agents of the British constitutional monarchy had been governing British subjects in New South Wales. Now that monarchy itself was, willy-nilly, established there in a form which the colonists themselves essentially devised. It was a modified version of that "disguised republic" which Walter Bagehot classically described for Britain – which he recognised as having been adapted for colonial use – and in which he discerned an indispensable role for the Crown's "dignified" functions. The colonial governments of the nineteenth century, thus understood, were also part of a process which recognised the essential independence of the colonies. Our present system and status stem directly from this. I have to suggest that it is incomprehensible without the monarchy as both the originating element and the enabler of continuing political and constitutional development. It was integral to the formation of the Australian political character and–to use the word so much bandied about in this context–image. The empire and the monarchy were as much part of the "real" Australia as the bush and bushmen.

More, by adopting the Crown in both its symbolical and its residual practical capacity–a practical capacity perhaps much more considerable in the colonies than in Britain, as Bagehot, once again, observed–the Australian colonies provided themselves with a mechanism which had, unpredictably enough, enabled the conflict of opinions and parties embodied in the British parliamentary system to be moderated and civilized to an extent unknown almost anywhere else. This was what had been so much admired and envied by Montesquieu and others in the declining years of the ancien r,gime in France. To alter the metaphor, the Crown by the 1850s, because of the properties acquired over a long period of turbulent uncertainty, was able to act as a catalyst in that spectacular transition from aristocratic government to democracy which was one of the leading features of nineteenth century British history. Ironically, this transition occurred, or began to occur, earlier in the colonies than in Britain. But in each case, it was because of the Crown's function of appointing ministers according to the expectations of the most modern political behaviour, that we were enabled to dispense with serious ructions.

Let us by all means recognise that not everything was clear-cut or without difficulty. The Canadian crisis of 1849; the chaos of Victoria in the 1860s and 1870s; the Reform bill crisis of 1831-2 and the 1909-11 People's Budget/Parliament Act episode in Britain: in every case the survival of the constitution, of the political system altogether, was at risk. In every case catastrophe was averted with the aid of the role which the sovereign or the sovereign's representative was able to play. The individuals concerned hesitated, or were inept, even (in the case of a governor) had to be removed, before a result was obtained. But the institution was of such strength and yet flexibility that reasonable outcomes eventuated. I see no reason to suppose that it has lost these qualities. But we cannot know unless circumstances put it to the test.

Inevitably, someone will say the terrible words, "nineteen seventy five", in the Australian context. Sir David Smith, whose polished and insightful contribution to the republican debate we heard last night, was in attendance upon the principal players. From evidence such as his we are able to begin to piece together a version of the episode which is somewhat superior to what was portrayed in the television show a few years since called "The Dismissal"–not to mention other sources which pretend to be fact, not fiction. But I believe that we can invest "1975" with a significance which, as far as I am aware, has been missed. Mr Whitlam and his friends would have us believe that it showed what immense and extraordinary powers belong to the "undemocratic", "appointed official"–powers "greater than those of the Queen"; powers which "no British monarch has exercised since Queen Anne". Let me leave aside the historical inaccuracy of the last allegation: I seem to hear the ghost of George III protesting vigorously, and that of William IV muttering somewhat. But we had best stick to the present (or rather the recent past).

It seems to me that two large truths were demonstrated during our 1975 drama, in relation to the role of the Crown in the Constitution. One was the capacity of the governor-generalship to absorb the odium which undoubtedly and inevitably was visited upon the particular holder of the office. It is doubtful whether anyone outside the aggrieved Whitlamites is now particularly disturbed by the fact that a distinguished if pretentious Prime Minister was removed from office precipitately by an "unelected official". But even that is not the main point.

The 1975 crisis showed as clearly as anything could, that the Governor-General could not aspire to political eminence or power. He removed, it is true, the power of a political office holder. But in order for the government of the country to be carried on, he assumed as a matter of course that he must secure the services of a replacement in that same office. The Governor-General himself had no possibility of undertaking personal government. His function began and ended with the removal of one minister, and the appointment of another, subject to the condition that parliament

would be dissolved and the new minister submit himself and his colleagues to the judgment of the electorate.

Pace John Hirst and others, I cannot believe that any newly invented President would be merely a Governor-General renamed, an officer appointed on the advice of the Prime Minister. It is impossible to suppose that a presidency would not be made, in some way, an elective office. And I have the utmost scepticism for any claim that such a President, however cleverly constructed may be the definition of the powers of the office, would not be liable to feel called upon to assume government in person in circumstances as palpably chaotic as those of November 1975. Given an office not imbued with the mystique and the inherited inhibitions of constitutional monarchy–the product indeed of the deliberate rejection of the institution–it requires no stretch of the imagination to see that its holder could claim a necessary personal authority to establish a new political pattern.

I contend, in short, that while our present system is not so well provided with safeguards as to render impossible a tyranny constructed by a ministry with a secure majority in parliament and a party discipline of the order of those now existing, it most certainly ensures that the Head of State both is unable to establish such a tyranny and has the distinct option of frustrating the untoward or illegal intentions of an "elected minister". And, in passing, I should say that I believe we would do well to consider whether the present mode of nomination to the Governor-Generalship (and State governorships) ought not to be changed. It is no reflection on the actual performance of various holders of the office to say that it should not be liable to doubts raised by what are only too easily perceived as self-serving political motives on the part of ministers whose privilege it is to recommend a name (or names, as it ought to be) to the sovereign. One's mind turns to a device on the lines of the Council of the Order of Australia, whose function it could be to provide the Prime Minster with names from which, say, three might be selected for recommendation.

We need not however confine ourselves to such severely practical–or potentially practical–dimensions. In the minds of republicans the monarchy is usually identified with Australia's relationship with Great Britain. This indeed is how it should be! The disquiet I experience is to do with the destruction they wish to wreak on the one in order to be rid of the other. John Hirst, in the article I mentioned at the start, is I think extraordinarily optimistic as to the likelihood of consciousness of British heritage not being jettisoned with the monarchy. It is an aspect of the republican agenda which can truly be called "hidden", but which is given away by the utterances of Mr Keating as much as any. Too many republicans wish to achieve, in other words, not merely an institutional discontinuity but an historical one as well. They are of the ilk which would either expunge our British connection from our learning and our memories, or represent it in such a way as to make it encompass the major part of any demonology which might be desired.

It seems to me further that the present time requires us to consider more carefully than perhaps ever before the question to which persons such as Mr Keating have given what I consider to be an unacceptable answer. We are instructed by him and others to forget our links with Britain in particular, and Europe in general–except, of course, to the extent that such links might serve the purposes of "multi- culturalism"!–and to regard ourselves as unequivocally part of Asia (or, sometimes, the Pacific). It is as though cartography, masquerading as geography, is to become the ultimate cultural and political determinant. One of the obvious ways to achieve this would be to do precisely what John Hirst has argued against–to eliminate those aspects of our history which demonstrate as clearly as any such things can do, that our origins are thoroughly, if not wholly, European and, in particular, British. And what better way to begin the great work than by

setting about an institution, to abolish which would be a remarkably dramatic way of exhibiting disregard for our history and character?

We should observe one of the most recurrent arguments of the present republicans, which the Prime Minister has taken specially to his heart. It is that we cannot be respected or understood in our "region" if we continue to exhibit symbols and institutions which indicate a particular association with Britain. In order to obtain the proper recognition of Indonesia (which seems to be most in mind), or Korea, or wherever, we must make obeisance to the god of decolonisation. We must seem to acknowledge that we are what we were not: artificially incorporated in an empire which is no more. We must (if I may adapt a well-known expression forming part of one of the more substantial republican furphies) cringe to the political and racial ideas of others. Worse in a sense, we must assume that our immediate neighbours are incapable of understanding that which might not be immediately evident to them; and rather than try to explain ourselves in terms of our own integrity, we should take such steps as will at once placate prejudices and eliminate evident differences. Quite apart from the issue of whether such an attitude is consistent with self- respect, it seems to me clear that to maintain our present constitutional monarchy is the first item in retaining a significant, even massive, link to a Europe of which we ought remain a part. In The Age, 23 July, Mr Justice Kirby of N.S.W. was reported–briefly and perhaps reluctantly, given that newspaper's editorial commitment–as having said something to this effect. As far as I am aware he is not known for his obscurantist attachment to past irrelevancies. The task before us, in short, is that of rejuvenating that which has been artificially debilitated.

Yet ARM claim to be in tune with the present and future! It is legitimate to ask by what supernatural power our republicans see into the future. We are bidden to understand that we can produce a new "image" of ourselves for consumption abroad, but also within the country. This might well be the case. Tom Paine made the point in 1792 in the aftermath of the French Revolution: he insisted on the need for "regeneration", taking the French as a model. Well, destruction is as capable of creating change as anything else. But to what purpose or actual effect? What can in fact be predicted about such a theoretical proposition?

Our republicans would of course make public enemies of themselves if they suggested that we need or ought to accept a "French Revolution". But it is all, of course, "in the mind" . What they wish to do is to partake intellectually of the revolution mentalit,. Unlike many other countries of the New World, Australia does not owe its identity or character to rejection or rebellion, let alone revolution. Apparently this is a matter for regret to our republicans. Since it is hardly conceivable that they can, or even feel they ought to, arrange for barricades and blood on the streets, they must needs resort to the institutional discontinuity which I've already mentioned: a kind of substitute for a revolution. We might not have a Bastille, and we can hardly hope to have the House of Windsor guillotined, but they envisage that we can, by the sort of Act of Parliament which Thomas Carlyle so scathingly put in its place in the 1830s, remove its baleful influence.

To the suggestions of those of us who don't relish such discontinuity, they offer assurances that the "real" essence of our political system–parliamentary government, the rule of law, etc–will not be affected. Here is a furphy which arises out of the fantasy. Some of what I have said above relates to it. But there is more, and it deserves attention in terms of the objects of The Samuel Griffith Society. It seems to me that the minds which propose this kind of radical change are unlikely to be satisfied with just the one, however complicated. The mere business of coming to some agreement, between political parties, between classes and groups in the community, between groups of experts, would be difficult enough. What though of the various implications which someone or other would be bound to read into the situation? It is a destabilised situation. Who can tell what extravagances might suggest themselves to the imaginations of persons who are so capable of promising all things, when they have no certain knowledge of what exactly

they can deliver? It would provide the perfect occasion for a complete re-writing of the Constitution.

There is another disturbing problem in the proposed process. Thomas Keneally is the high priest of ARM as far as I understand. Senator Schacht is an acolyte, and I had the misfortune to encounter one of his utterances recently, inevitably incorporating bon mots from Keneally. It was a brief article purporting to put the case of the republicans for public debate based on "fact not emotion". Most of it was devoted to cataloguing the features of, or associated with, the British monarchy which would be most likely to offend or repel certain groups. One was Roman Catholics (there would seem to be, amongst other things, an arriŠre pens,e that a substantial segment of the population is to be issued with a separate agenda by those who assume that being Irish brings with it a birthright of attitudes so well expressed by the late Edward Kelly, of Jerilderie, Glenrowan and the Old Melbourne Jail); another was "the young" (who are assumed, of course, to be manipulable, and contemptuous of things traditional or dignified); and, lastly, more or less recently arrived immigrants from elsewhere than the British Isles.

The last group–recently arrived immigrants–deserve special notice. ARM hopes to extract much mileage from "demographic changes". They urge that recently arrived immigrants from Europe and Asia cannot be expected to understand, let alone find acceptable, the condition by which Australia acknowledges a sovereign who not only is "not Australian" (in the crude sense meant by Messrs Schacht & co.) but resides in a country 19,000 kms distant. It is emphasised that most recent immigrants are not of British origin. We are assured that many actively dislike "the British" or, coming perhaps from republics of recent creation, verily resent the existence of a monarch. This is touted as "new". Yet lack of affection for the monarchy or its government, or for the mother country, was hardly unknown amongst some British immigrants since the beginning of settlement; and such sentiments have been much cultivated in this century by what might be called a Sinn Fein element amongst us. But of what validity is this line of argument? Doubtless a considerable number of adult immigrants experience an initial difficulty with the subtlety and complexity of our constitutional system. Why, though, must they be supposed to remain puzzled? It is true that no effort is made to enlighten them, while their children at school will look in vain for a curriculum which makes sense of such aspects of Australian history and government. But they have a right to feel more than a little insulted to have it asserted or implied that they are incapable of acquiring an understanding of this one of the peculiarities of their adopted country.

We do not know how numerous are Anglophobe immigrants. Such as they are, they will doubtless support ARM. That their opinions and their existence should be elicited as a reason for others to give a like support is palpably out of order. Apart from the fact that most people presumably choose to come to Australia to enjoy the benefits associated with institutions which are essentially British in origin, it is quite extraordinary that the preferences or prejudices of immigrants to a country should be cited as, in themselves, reasons for changing the constitutional and political structure of that country. The respect paid to them by our republicans is uncomfortably akin to their sensitivity to alleged "regional" expressions of contemptuous disbelief that we have not jettisoned our "colonial" monarchy.

Some at least of republicans must be assumed to have a real concern that immigrants be not required to abjure their former countries. This leads to some consideration of "the oath", which has been made into a fantasy and a furphy at once. Both J Hirst and the Prime Minister assume convenient objections to swearing allegiance to the sovereign. But the value of allegiance to a sovereign is that it implies–symbolises–not something to be taken quite literally, except to some extent in the case of military officers and civil servants–but as nothing else can, a personal obligation to obey laws, respect institutions, and adopt values without having all or some of them

shoved down one's throat. At the same time it leaves interpretation to individuals and to the common behaviour of the community. The limitation is that they must obey the laws: and for this the oath taken by new citizens amply provides. Inevitably immigrants must, if they are to be Australian citizens (and subjects), renounce obedience to the governments from whose jurisdictions they have removed themselves. But if they are required to swear allegiance to a sovereign, in a form which indicates personal obligation, they are far from having to suggest that they no longer have any feeling for their old countries. But, of course, this is not something which seems to occur to our republicans. It does not accord with their "logic".

J Hirst urges that the oath of allegiance is an "empty ritual". I cannot myself see how his suggested replacement is any less empty. Most people, he says, cannot understand personal allegiance. Do they any more understand the motherhood phrases of proposed replacements? How many are prepared to admit that they represent the values which they most desire? Unless the list is utterly comprehensive–and the mind boggles at the length it would have to go to, not to mention the need to provide for "strike out if not applicable"–it is far closer to being empty than is the catchall of allegiance to a "mean-anything" sovereign. Hirst also urges that the pledges he would exact constitute a training in citizenship. He has, I fear, more confidence than most sensible people in the general capacity or willingness of oath–takers to be significantly instructed by the words they utter. On the other hand, an oath which excludes reference to the allegiance due from a subject to his or her sovereign is probably as solid a contribution as could be wished to the business of rendering nugatory that which republicans have targeted.

I end with a revisitation of my opening reference. John Hirst, who has given the only reputable conservative argument for a republic, believes that the civic unity of this country would be revived by such an innovation. He has no confidence in the functionality of our existing arrangement. Our only option, under this view, is to make the change. It seems to me a proposition which is at once over-clever and yet naive. There are absolutely no grounds for supposing that any institution invented here and now will achieve anything like the result he predicts. A speculative outcome so uncertain, so unlikely, surely should persuade us to avoid experimentation. Worse, in order to implement it a referendum must be held for an amendment or amendments to the Constitution–indeed, for a reconstruction of the Constitution. Is there reason to believe that it would be unopposed, a bi-partisan undertaking? A deeply divisive issue would become the subject of a bitter campaign. If the republican case were won it would not be by the overwhelming margin of votes or unanimity amongst the States which alone could vindicate it. The result either way would leave a substantial minority of the population with a feeling of deep dissatisfaction and resentment. No argument so far heard is sufficient to justify such an outcome.

With some reason John Hirst seems to be sceptical of the respect in which the political institutions of this country are held. But why should he single out the least "political" institution as the weakest component? More, there is an intimate and inescapable connection between the "dignified" and "efficient" parts of the constitution (to adapt Bagehot's expressions). To assert the poverty of the monarchy cannot be confined to the Crown itself. All parts of our constitutional structure suffer the disrespect which Hirst laments. Time after time we are regaled with reports and opinions, sometimes based on "polls", which show how "politicians" are held in exceedingly low esteem in public estimation. This is not because they are part of a monarchical system. It is because they seem unable to conduct their part in that system with sufficient decorum, public spirit, effectiveness, or freedom from the tyranny, not of a monarch or her representative, but of their party machines. If rigorous logic is to be employed, we should be mainly troubled by the behaviour of those machines and of the M.P.s which they produce: we should, in fact, be troubled by the consequences of democracy! But that is to verge on reductio

ad absurdum and might furnish a warning against assuming that there is only one standard or mode of "logic".

Chapter Eleven

Old Colonisations and Modern Discontents: Legacies and Concerns

Alan Frost

The delineation and filling of space is central to European culture. Boundaries of various kinds are raised, not only to exclude but also to include. Title to a housing block, for example, cannot be given until the block is surveyed. A farmer knows which are his crops according to where his farm begins and ends. Law cannot function without the area of its jurisdiction being defined. A nation does not exist without boundaries that differentiate it from its neighbours.

Once they have defined/created a space, Europeans proceed to fill it with the evidences of their culture. This process involves, variously, acts of consecration; the implanting of the archetypes of (European) cosmos – houses, roads, farms, parks, gardens, cities; the development of systems of administration; the elaboration of bodies of law; and the evocation of this now humanized world in literature and art.

Lacking any of the accustomed signs of human transformation, Europeans found New South Wales in 1770 or 1788 to be undifferentiated in time and space, exhibiting only those basic geographic forms familiar to their imagination – harbours and bays, mountains, valleys, water courses, plains, and spaces without trees. While these constituted the raw materials from which cosmos might be wrought, humanized reality was latent only. New South Wales was effectively a `Virgin Mould, undisturbed since the Creation'; or, as Lieutenant James Cook put it, with the precepts of the Natural Law writers in mind, `We are to Consider that we see this Country in the pure State of Nature, the industry of Man has had nothing to do with any part of it'; so that the one thousand persons who landed at Sydney Cove as January turned to February 1788 faced what was for them a primal landscape. They were first colonists, and the world was all before them.

The colonists' initial task, therefore, was to define the space to be transformed. Phillip began to do this on the morning of 26 January 1788, when he landed a party of convicts and marines on the shore of Sydney Cove, and had them fell some trees. Then, hoisting a flag in the middle of the space, he took formal possession of the site, with his officers toasting the health of the sovereign and the success of the venture. The marines fired a `feu de joie', all those on shore gave three cheers, which were returned by the crew of the Supply. Phillip repeated this ceremony in the evening, when the whole convoy had arrived.

Two weeks later, led by the band and with colours flying, the marines marched into what was now their parade ground and encircled the seated convicts; Phillip stood bareheaded in the centre, in the company of his principal officers; and all heard the Deputy Judge-Advocate formally establish the colony and Phillip's governorship of it, by reading his commission and the royal Letters-Patent establishing the law courts. The marines discharged their muskets at intervals, and the band played `God Save the King'. Phillip concluded this initial process of cosmosising ritual on 4 June, on the occasion of the King's birthday, when he and his officers toasted the County of Cumberland, the limits of which he set as Broken Bay to the north, Botany Bay to the south, and the Lansdowne Hills (Blue Mountains) to the west.

With the colony's space delineated, the colonists set to implanting their culture's archetypes in it. In the first days and weeks, they felled trees, blew up stumps, cleared stones, fenced, erected

tents, turned ground, planted vegetables, planted trees and vines, built a simple wharf, landed stores, built storehouses, barracks, a hospital, a governor's house. Inevitably, the business was at first disordered, but, as one person present observed, the confusion

will not be wondered at, when it is considered that every man stepped from the boat literally into a wood. Parties of people were every where heard and seen variously employed; some in clearing ground for the different encampments; others in pitching tents, or in bringing up such stores as were more immediately wanted; and the spot which had so lately been the abode of silence and tranquillity was now changed to that of noise, clamour, and confusion.

And sure enough, order did `gradually' prevail. After three months, the camp covered just over one acre. And while its buildings were crude ones, these and the first plantings did give the landscape an elementary European form, create a tentative European presence. In the next weeks, months and years, the colonists continued this process, erecting substantial buildings, such as the first Government House; extending the settlement to Parramatta, then further over the Cumberland Plain; making farms, and forming tracks to link them to the townships; raising crops, raising herds and flocks; forming a society, whose children knew no other `home'. When the Malaspina expedition called at Sydney in March 1793, its officers found that, approaching Parramatta,

the land changed in appearance, the view was delightful because of the number of cultivated plots. It delights the spirit to see the happy change in conduct of some men who, if they had been enemies of society, were today useful to their country by their application to work and because of the constant efforts by which they transformed a rough and uncultivated country into a pleasant garden. It had been in existence for hardly five years and yet had the appearance of an old establishment.

In the decades following, the colonists continued their humanising process, which now went forward exponentially. They built a city at Sydney, with streets, shops, imposing buildings, mansions; they built a village at Parramatta. When they had occupied all of the useable areas of the Cumberland Plain, they declared nineteen counties, and spread over them. Some, more desperate or more adventurous than their fellows, took their now–burgeoning flocks and `squatted' beyond the limits of location. The parent society gave them instruments of administration and governance, and allowed them to develop local regulations.

By the 1830s, the transformation of New South Wales was such as to engender awe. That Sydney should after so short a time be `a large and well built town, abounding with all the expensive luxuries of civilized life', Louisa Meredith thought, could not fail to `strike a thinking mind with wonder and admiration. Behind Sydney were the gardens and orchards of the Cumberland Plain. John Dunmore Lang thought that the fruit groves could `scarcely fail to remind the scholar of the gardens of the Hesperides'. Throughout the Nineteen Counties, and beyond the Great Divide, were regions which, in William Charles Wentworth's opinion, were clearly `fit to be inhabited by civilized man' – a seemingly `endless variety of hill and dale, clothed in the most luxuriant herbage, and covered with bleating flocks and lowing herds', crossed by roads, and studded with farms and houses. And beyond the limits of location were other, and vaster, regions awaiting transformation. In `Australia Felix', Thomas Mitchell had a distinct sense of cosmic purpose:

As I stood, the first European intruder on the sublime solitude of these verdant plains, as yet untouched by flocks or herds, I felt conscious of being the harbinger of mighty changes; and that our steps would soon be followed by the men and the animals for which it seemed to have been prepared.

Clearly, the process of rendering European cosmos out of primal chaos in New South Wales could not now be stopped; and by this time, of course, that process was being re-iterated in other parts of the continent.

Of such were the sociology and renderings of reality of Europeans then. Knowledge gained in the past two hundred years, and attendant changes in consciousness, have given us other understandings. We know, for example, that the bush and grasslands about Sydney and the plains of the Western District were not silent of human voices. We know that, in places, the Aboriginal inhabitants of Australia were numerous and lived in permanent or semi–permanent villages; that they did, by `firestick farming' and other means, to some extent manage some of the land's resources; that they did possess bodies of customary law and religious beliefs; and that they conceived of time, space and place in ways fundamentally different from European ones.

We also know that, variously through dispossession, murder, disease and cultural atrophy, there was a rapid, and massive, depopulation of these indigenous inhabitants from early in the nineteenth into the twentieth century. Awareness of these things, and the guilt they give rise to, have combined to create a very different sense of colonisation from that the early colonists themselves had, have caused some to conceive of the British (not to mention all Europeans) in the way of Swift's Lemuel Gulliver, who at the end of his Travels (1726) explained why he had not taken possession in the King's name of his discoveries:

To say the Truth, I had conceived a few Scruples with relation to the distributive Justice of Princes upon those Occasions. For Instance, A Crew of Pyrates are driven by a Storm they know not whither; at length a Boy discovers Land from the Top-mast; they go on Shore to rob and plunder; they see an harmless People, are entertained with Kindness, they give the Country a new Name, they take formal Possession of it for the King, they set up a rotton Plank or a Stone for a Memorial, they murder two or three Dozen of the Natives, bring away a Couple more by Force for a Sample, return home, and get their Pardon. Here commences a new Dominion acquired with a Title by Divine Right. Ships are sent with the first Opportunity; the Natives driven out or destroyed, their Princes tortured to discover their Gold; a free Licence given to all Acts of Inhumanity and Lust; the Earth reeking with the Blood of its Inhabitants: And this execrable Crew of Butchers employed in so pious an Expedition, is a modern Colony sent to convert and civilise an idolatrous and barbarous People.

As I wish to explain, the historical reality – or, at least, that of the later eighteenth century – is rather different from this now re-iterated view. And I wish to explain this, not only for history's sake, but because that history remains relevant to our nation's present quandaries where land rights, native custom, and the social rights of minority groups are concerned.

In 1493, believing that he held temporal lordship over islands and might therefore grant them to others, Pope Alexander VI divided the new oceanic world between Spain and Portugal, a division the Iberian nations formalised the next year by the Treaty of Tordesillas. Since it comprehensively excluded them, such a basis of title to overseas empire naturally displeased the northern European nations, whose spokesmen argued instead for title as a consequence of negotiation or purchase, or discovery and occupation. In the seventeenth century Grotius and Pufendorf, and in the eighteenth, Wolff and Vattel were particularly significant in the elaboration of an alternative basis of title to overseas lands.

By the mid–eighteenth century, the theoretical basis of a new convention of acquiring empire had emerged. If a European state (`a Christian Prince') had already established an effective possession of a region, another might acquire title to it only by formal cession (which might or might not involve outright purchase). If the region was not already possessed by a rival, then a state might acquire it in one of three ways, viz.:

– by persuading the indigenous inhabitants to submit themselves to its overlordship;

– by purchasing from those inhabitants the right to settle part or parts of it;
– by unilateral possession, on the basis of first discovery and effective occupation.
Two of these rubrics conceded the indigenous a right of possession, the third did not. Europeans determined the presence or absence of this right according to an amalgam of perceptions arising from the work of the writers on the law of nature and nations. From the author of the book of Genesis, from Grotius, Pufendorf and Locke, for example, they understood that after the Fall God gave the World `to Mankind in common', `to the use of the Industrious and Rational', and man first moved about it in an absolute state of nature, in which his only inherent individual property was the labour of his body. Though strictly limited in itself, this property gave man the means to acquire more. When he used it to gather the spontaneous produce of the earth, for example, the produce became his, because he mixed his labour with it. When he removed himself from the state of nature, locating himself in one place and enclosing and cultivating the earth, then his labour gave him further property:
As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common. Nor will it invalidate his right to say, Every body else has an equal Title to it; and therefore he cannot appropriate, he cannot inclose, without the Consent of all his Fellow–Commoners, all Mankind. God, when he gave the World in common to all Mankind, commanded Man also to labour, and the penury of his Condition required it of him. God and his Reason commanded him to subdue the earth, i.e. improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour. He that in Obedience to this Command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his Property, which another had no Title to, nor could without injury take from him.
If then, the inhabitants of a region over which a European state was interested in acquiring sovereignty had advanced beyond the state of nature and mixed their labour with the land so as to have enclosed and cultivated it, made roads and raised houses and towns; if they had formed themselves into a society exhibiting the use of reason in systems of customs, religion, and commerce; if they had developed a code of laws, and a government to administer this code; that is, if they had formed themselves into a polity, then they had established sovereignty over the region, and the would–be possessor had either to persuade them to accept overlordship, or to lease a portion.
However, if the indigenes had advanced beyond the state of nature only so far as to have developed language and the community of the family, but no further; if they had not yet mixed their labour with the earth in any permanent way; or if the region were literally uninhabited, then Europeans considered it to be terra nullius (ie, belonging to no one), to which they might gain permanent title by first discovery and effective occupation.
Europeans signified first discovery of a terra nullius by leaving proof of their presence (for example, stone crosses, cairns, inscriptions on trees and poles, gifts to inhabitants). They established a preliminary right to possess it if, carrying a commission from their sovereign authorising them to do so, they claimed it formally on his behalf, and accompanied their proclamation with symbolic acts of sovereignty, such as the raising of their flag and the firing of salutes. To render a preliminary right real, a state had to occupy the region effectively within a reasonable time. This it did when it either transferred a portion of its population, together with its customs and laws, to the region in an extensive colonisation, or when as a minimum, it settled one spot in the region, and sent representatives on regular patrols about the whole.
This basis of title to overseas territory accorded far better than the earlier one with the needs of the northern European nations wishing to enjoy the fruits of the New World and the East; and Britain, France, and Holland both adopted it eagerly, and progressively forced Spain to do so.

We see this second basis being utilized in Africa and Asia, North America and in the Pacific Ocean from the mid–eighteenth into the mid-nineteenth century. Between 1763 and 1774, for example, Britain concluded perhaps a dozen treaties for trade and navigation rights, for alliance, and sometimes for the use, cession, or purchase of land for forts and factories with the Barbary States and a number of Asian principalities.

In North America when, early in the eighteenth century, the British began to expand their colonies on the New England seaboard, they encountered the powerful Iroquois League of the Six Nations, with which they negotiated for land and trading rights and, in times of conflict with the French, for alliances. When the Seven Years War left Britain dominant over her European rivals, she faced powerful opposition from the Indian confederations, so powerful in fact that by the Proclamation of (October) 1763, Britain conceded the right of `the several nations or tribes of Indians with whom we are connected' to possess vast areas of land to the west of the Allegheny Mountains; and also that her nationals had no rights to settle in these areas without the Crown first purchasing land by consent of these Indians. Between 1763 and 1768 British officials negotiated a series of treaties (five in 1764 alone) with the League and with its counterparts south of the Ohio River, which were intended formally to differentiate respective domains and jurisdictions. This `Treaty System' soon fell apart, as treaty provisions were turned into what became essentially a system for the transfer of title to lands, a process which accelerated after the United States gained their independence, and also into the nineteenth century, as the Americans spread westwards .

The 1763 Proclamation also recognized the area of the Great Lakes as Indian country; and in the 1780s British officials negotiated with the Algonquian tribes for the purchase (by once–only payment of trade goods) of land for refugee American Loyalists. From 1818, the government of Upper Canada changed the mode of purchase, by offering (in the manner of the French before them) annual rents or annuities in perpetuity. Between 1871-7, much of prairie Canada was ceded by the Metis and Indian peoples to the infant Dominion, in return for reserves, annuities, and the promise of security from hunger and disease. In the 1870s and 1880s, other arrangements were formalised in an Indian Act, designed essentially to `civilise savages', which, even though some of its harsher provisions were amended in the 1920s and 1950s, has left bitter legacies.

By the early 1980s, the situation concerning Canada's indigenous peoples – Indians, Metis, Inuits – was most confused. There were approximately 180,000 people whose forebears had concluded treaties with the Dominion; and about 120,000 who, while not descended from treaty–makers, nonetheless had the `status' of Indian. There were also some 700,000 native people who had neither `treaty' nor `status' identification. In 1982, impelled by a vision of `an open society all of whose citizens would be protected by an entrenched bill of rights guaranteeing, among other things, their linguistic rights', Trudeau enacted the Charter of Rights. While its provisions fell short of his ambition for it, this did guarantee (among other things) civil and linguistic rights to women, native peoples, and the inhabitants of Quebec. In the 1970s and 1980s, Canadian courts have issued a number of decisions affirming that the title of indigenous peoples to land was not extinguished by treaty.

In 1835 James Busby, the British Resident in the North Island of New Zealand, became concerned that the French might annex the islands. He therefore induced thirty-four chiefs to sign a Declaration of Independence, and to petition William IV for protection, which request the Colonial Office acceded to. In 1839, as a prelude to obtaining sovereignty over the islands, Normanby accepted that Britain had thereby acknowledged New Zealand as a `sovereign and independent state', and that the Crown would only claim sovereignty with `the free and intelligent consent of the Natives, expressed according to their established usages'. From the British point of view, the Treaty of Waitangi (February 1840) involved the Maori chiefs

surrendering sovereignty to the British Crown, in return for guarantees of possession (including of land and mana). On the other hand, the British thereby also required that all future land sales by Maori be directly to the British Crown. Partly because of different connotations in the respective versions of the treaty, Maori developed different understandings of what it involved; and these differences have been significant in recent decisions to return title of certain lands.

In August 1768 – like Byron, Wallis, and Carteret before him – Cook sailed for the Pacific Ocean instructed

with the Consent of the Natives to take possession of Convenient Situations in the [Southern Continent] in the Name of the King of Great Britain; or, if you find the Country uninhabited take Possession for His Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.

When he came to the eastern coast of Australia, Cook duly took possession of all of New South Wales in the name of George III – but without seeking the consent of the Aborigines. And in 1786-8, the Administration of William Pitt the Younger made effective this preliminary claim, by despatching the convict colony under Governor Phillip, without any instruction to him to seek the consent of the indigenous inhabitants.

Some people have lately seen in these different stances a curious aberration. To do so, however, is to make the mistake of supposing that the British perceived all indigenous peoples in the same way – which they manifestly did not. In Tunis, Morocco, Algiers and in India, for example, even as they understood that the societies differed greatly from their own, the British `saw' peoples with developed urban centres and extensive productive hinterlands, peoples with kings and princes, administrations, legal systems, armies and navies, religions, literature and art. In North America, while the indigenous cultures were certainly less `developed', the British also `saw' material and social structures that had meaning for them – villages and agriculture, individual and group ownership, chiefs and priests, political alliances, tributary arrangements. In Polynesia, too, the British `saw' these things. At Tahiti, Cook and his colleagues found villages, domesticated animals, gardens, temples, chiefs and priests and social hierarchies, armed forces, and a desire to trade. In the North Island of New Zealand, and at Princess Charlotte Sound at the head of the South Island, essentially the same situation obtained – fortified villages, gardens, war canoes, leaders, trade. And even though they did not possess metal, the Polynesians still had an intricate material culture, as evinced by their ceremonial cloaks and staffs, their artefacts, their weapons of war.

How differently the British `saw' the people on the eastern coastline of Australia. The Aborigines whom Cook and Banks encountered there were few in number. They never saw more than `30 or 40 together', Banks said; and he therefore surmised that the vast interior districts were likely uninhabited. This sparse people enjoyed few material comforts. They had no clothes, not using even the skins of animals either to protect themselves from the elements, or to guard their modesty. Even the women went naked.

The Europeans found the Aborigines' houses to be of the most insubstantial construction. In some areas, Banks recorded,

a house was ... nothing but a hollow shelter about 3 or 4 feet deep built like the former and like them covered with bark; one side of this was intirely open which was always that which was sheltered from the course of the prevailing wind, and opposite to this door was always a heap of ashes, the remains of a fire probably more necessary to defend them from Mosquetos than cold.

To the Europeans, the Aborigines seemed

never [to] make any stay in [their houses] but wandering like the Arabs from place to place set them up whenever they meet with one where sufficient supplys of food are to be met with, and as soon as these are exhausted remove to another leaving the houses behind, which are framd with

less art or rather less industry than any habitations of human beings probably that the world can shew.

The Aborigines had not enclosed the country to depasture herds and flocks, nor had they wrought an agriculture upon it. And just as they did not labour in the sweat of their brow for their food, neither did they manufacture to any degree. Their few utensils, weapons, and ornaments were crude in the extreme – mere pieces of wood, stone, shell, bark, bone, or hair, fashioned in rudimentary ways to meet only basic needs. Having no items of trade (whether of growth or manufacture), the Aborigines also showed very little interest in those which the Europeans proffered. The Botany Bay people did not touch the `Cloth, Looking glasses, Combs, Beeds Nails &ca' that Cook left for them. The Endeavour River people showed a similar disdain. As Banks later said, `there was nothing we could offer that they would take except provisions and those we wanted ourselves'

And the Aborigines had scarcely begun to develop social, political, or religious organisations as the Europeans understood these things. True, they had advanced so far from the absolute state of nature as to use language (though neither Cook nor Banks nor Tupaia, by this time skilled at improvising in such situations, could at first understand `one word they said'); and, true, they discernibly lived in families. Of larger structures, however, the voyagers found no signs. They noticed no social hierarchies, nor political institutions. As Banks later said, he and Cook had no information about the `Government under which [the Aborigines] lived'. Nor had they found signs of organised religion. To them and to their contemporaries, the implication was clear – if they did so at all, the Aborigines possessed only rudimentary social structures.

Cook and Banks's reports, then, indicated that the Aborigines had attained the `first stage' only of civilisation, that of

a small society whose members live by hunting and fishing, and know only how to make rather crude weapons and house–hold utensils and to build or dig for themselves a place in which to live, [who possess] a language with which to communicate their needs, and a small number of moral ideas which serve as common laws of conduct; [and who live] in families, [and conform] to general customs which take the place of laws.

In not having reached the stages of domesticating animals or of maintaining an agriculture, especially in not offering a political entity capable of negotiating on behalf of the whole society, in European eyes the Aborigines had not subdued and cultivated the Earth so as to obtain `dominion' over it. In Locke's description, New South Wales was one of those

great Tracts of Ground ... which (the Inhabitants thereof not having joyned with the rest of Mankind, in the consent of the Use of their common Money) lie waste, and are more than the People, who dwell on it, do, or can make use of, and so still lie in common.

In Cook's words, it was `in the pure state of Nature, the Industry of Man [having] had nothing to do with any part of it'.

To Cook (and to Banks and their contemporaries), then, eastern New Holland was terra nullius. Was he its first European discoverer? As he himself knew clearly, he certainly was not of the northern, western, and southern coasts, which Dutch navigators had run along in the seventeenth century. But contemporary maps and charts carried no valid representation of the eastern coast; and as Cook progressed along it, he found no evidence (no cairns, plaques, weapons, iron keys or silver spoons) of any previous European presence.

As the first European discoverer, then, and carrying a regular commission to do so, Cook might claim this terra nullius for his sovereign. And this he did particularly and generally. While at Botany Bay, he `caused the English colours to be display'd ashore every day and an inscription to be cut out upon one of the trees near the watering place seting forth the Ships name, date &ca'.

He repeated these gestures at intervals along the coast. Then, on 22 August 1770, when at the entrance of Torres Strait, rightly thinking that he might therefore

land no more upon this Eastern coast of New Holland, and on the Western side I can make no new discovery the honour of which belongs to the Dutch Navigators, but the Eastern Coast from the Latitude of 38ø South down to this place I am confident was never seen or viseted by any European before us, and Notwithstand[ing] I had in the Name of His Majesty taken possession of several places upon this coast, I now once more hoisted English Coulers and in the Name of His Majesty King George the Third took possession of the whole Eastern Coast from the above Latitude down to this place by the name of New South Wales, together with all the Bays, Harbours Rivers and Islands situate upon the said coast, after which we fired three Volleys of small Arms which were Answerd by the like number from the Ship.

When the Pitt administration despatched Phillip, a handful of civil officers, some two hundred marines and 750 convicts to form a settlement at Botany Bay, `or some other place contiguous thereto' and this party did so at Port Jackson, the ministers followed up Cook's first discovery and formal proclamation with effective occupation within a reasonable time. According to the decorum then emerging between European states, they thereby confirmed Britain's right to possess the eastern third of Australia.

So as James Stephen, the legal adviser to the Colonial Office afterwards observed, the British acquired New South Wales `neither by conquest nor cession, but by the mere occupation of a desert or uninhabited land'. As David Collins, the colony's first legal officer, effectively elaborated this gloss,

we were confined along the coast of this continent to such parts of it solely as were navigated by Captain Cook, without infringing on what might be claimed by other nations from the right of discovery. Of that right, however, no other nation has chosen to avail itself. Whether the western coast is unpromising in its appearance, or whether the want of a return proportioned to the expense which the mother–country must sustain in supporting a settlement formed nearly at the farthest part of the globe, may have deterred them, is not known, but Great Britain alone has followed up the discoveries she had made in this country, by at once establishing in it a regular colony and civil government.

In their occupation of New South Wales, the British followed carefully the convention of acquiring overseas territory which had emerged over the previous two hundred years, the general adoption of which they had done most to foster. This convention did provide for negotiation with an indigenous population for access to land; and, had Pitt and his advisers known that the Aborigines were not truly nomadic, that they had indeed mixed their labour with the land, and that they lived within a complex social, political, and religious framework – that is, had the British not seen New South Wales to be terra nullius, then I believe they would have negotiated for the right to settle the Botany Bay area.

Cook and Banks were percipient, tolerant of racial and cultural difference, and empathetic to a remarkable degree, far beyond the generality of their contemporaries. Pitt, Dundas, Mulgrave, W.W. Grenville, and Nepean made strenuous efforts to give their consciousness of the integrity of non- European cultures legislative and practical effect. Phillip, too, was moved by the same ideals as those who despatched him, and in the face of grave difficulty he made great efforts to have European and Aborigines co–exist peacefully about Port Jackson. If any group of Europeans of this time might have adjusted their perceptions and modes of procedure so as to accommodate the fact of the Aborigines, it was this one, but the Aborigines were simply too un-European for the British to comprehend them truly. Rather than evil intent or callous disregard, however, this failure shows most the limitations that even a diverse culture can place on the most flexible of its members.

Inevitably, historical circumstances leave legacies for the future. Now, when knowledge accumulated over two hundred years has given the Australian descendants of the first European colonists a much more comprehensive understanding of Aboriginal culture, we as a nation are perplexed to remedy the facts of dispossession and disadvantage. How is this best to be done? There is the legal way, of granting Aborigines title to (tribal) lands. This way has been followed by governments of various persuasions and with varying degrees of enthusiasm over the past two decades, and has resulted in Aborigines acquiring large areas of land. Recently, in the Mabo case, the High Court of Australia has restored title to the Murray Islands in Torres Strait to the Meriam people.

As I have read only newspaper reports, not the judgment itself, I can offer only a very qualified view – and one qualified also by the fact that generalisations about Aboriginal culture are often of limited usefulness. However, given that the culture of the Meriam people has strong Melanesian elements, including the habit of gardening, with the concomitant one of the inheritance of family plots, I doubt that this decision need in itself have general applicability. Again, it will take time for the implications of the Full Bench's decision to banish the doctrine of terra nullius from Australian common law; but if to future claims the justices apply the same criteria as in the Mabo case, I don't see that the results should be revolutionary.

On the other hand, I don't think we should argue against reasonable Aboriginal land rights where historical continuities are clear. Aborigines need land to sustain their culture(s); without land, they are as sailors cast adrift without rudder or compass. The loss of cultural identity, the loss of self–identity as a consequence of the loss of culture, may well create greater problems for society as a whole than does the granting of title.

In many ways, Canadian circumstances provide the most instructive parallels with Australian ones. In Canada, First Nations people constitute some 3% of the population, yet the social problems arising variously from their poverty, ill–health, lack of education and dislocation from family and culture in alien cities bulk very much larger. These problems have led to high youth suicide rates, and high crime rates, with native peoples constituting up to 43% of prison populations. In recent interviews, `prisoner after prisoner said that what was needed was not more courses in prison about welding or mechanics, but programs to help them find a lost sense of themselves and their native identity'. They asked for:

– `more support and interest from the chiefs and elders of their communities and not [to] be left to "rot in a cell"'.
– `youth retreats with elders to help native youths when they first begin to get into trouble'.
– `more native police, and natives on the parole board'.
– `more halfway houses for native offenders who are released
– not only in the cities but also in northern communities'.

The parallels in Australia are clear.

There have also been proposals for political rectifications of past injustices, in particular that a `treaty' or `instrument of reconciliation' be concluded with the Aborigines. I am dubious about the merits of this proposal, for three general reasons. The first is that I doubt that such a step can really right old wrongs, many of which are so old as to be irretrievable. The second involves a point which is technical, but not the less important for that. With whom would the majority of Australia deal in effecting this treaty? With the various bands or linguistic units scattered over the continent? With urban `spokespeople'? Or with Aboriginal representatives selected by some set of criteria which will inevitably be more European than Aboriginal in their nature? Almost inevitably, `representation' gives rise to bureaucracy, which tends to become solipsistic, self–justifying, and the consumer of large sums of public money. In other words, to pursue a treaty now would very likely involve the majority culture creating an opposing interface with which to

deal, one which may not well reflect the opinions and needs of particular Aboriginal groups, so that the nation would be left with yet another unsatisfactory outcome.

My third reason is the most substantial one. The negotiation of a treaty carries the implication of equality of the parties – ie, to negotiate a treaty with Aboriginal Australia implies a nationality equivalent to that of Australia as a whole. There are signs that, largely as a consequence of extended contact with European culture, Aborigines about the continent are developing a sense of shared identity. However, it may well not be in our whole interest to formalize this development by way of treaty. That is, whether or not it is regrettable that the British did not conclude treaties with Aborigines in the past, for Australians to do so now might well be both to create a political entity that has no historical reality; and to engender a large legacy of political, social, economic, and educational problems – problems which may well become so massive that the ill effects of a treaty would far outweigh its benefits.

It is at this point that recent developments in Canada and New Zealand are instructive. Canada is presently mounting a Royal Commission on Aboriginal Peoples which is to run for three years – something akin to our recent enquiry into Black Deaths in Custody, but considerably more comprehensive, given that it is to address questions of land tenure and title, native justice, social welfare, education, health. `We will want to look at things like the homeless', said the justice heading the commission, `[at] aid and employment, housing, the migratory patterns, disability, racism, addiction, cultural situation, social assistance, family violence'.

This enquiry has been instituted in part because of demands by First Nations spokesmen that customary law should have priority over the provisions of the Charter of Rights. Among the most vigorous opponents of this idea are native women, who have pointed out with harrowing detail that their cultures are intensely patriarchal; that under the old Indian Act they and their children suffered from poverty, hunger, physical and sexual abuse; and that the Charter of Rights gives them a protection (at least in theory) that would not be available to them under customary law.

In New Zealand, there have recently been very extensive transfers of land under the provisions of the Treaty of Waitangi back to the Maori. Running parallel has been the growth of a powerful Maori nationalism. Given that demographic projections indicate that the European and Maori populations will become equal by about the middle of the next century, this development may well prove impossible to reverse. Already, it is becoming mandatory that education proceed in Maori equally as in English, a development which brings with it both technical and social problems – for example, how well can western scientific concepts be enunciated in Maori? How well can Maori status and European administration join?

It is difficulties of these sorts that I foresee if we begin to give latent divisions in our society the formality of law. We should be one nation, all of us simply Australians, with equal rights, freedoms and obligations, without formal divisions based on race or ethnicity. We should also be willing to tolerate diversity – and I believe that in recent times Australian society has developed this tolerance to a very considerable degree. However, there must be points beyond which the centre will not hold, beyond which our society will fragment into disparate, conflicting groups. One of the great tasks before us now is to identify these points accurately. Another is to be unafraid to say so when we see we are reaching them. Some of the points certainly lie latent in matters pertaining to Aborigines, but they do not reside there only. It will take tact, goodwill, and compromise from all parties to avoid huge problems.

As platitudes like this last one are seldom very useful, I should like to conclude with one specific point. A few years ago, the distinguished anthropologist Ken Maddock said of traditional Aboriginal life, that it was

conducted at different levels, or rather within different degrees of inclusiveness, ranging from what we may think of as universalism at one extreme and acute particularism at the other. It may

well have added up to a subtle system of relationships, remarkably well adapted to the land, as Mr Justice Blackburn thought in the Gove Land Rights Case of 1970-71, but it does not lend itself at all well to being connected up with the social and political structures introduced by European settlement. The difficulty of making a connection may have been as fateful as assumptions about the land being thinly peopled or about the Aborigines leading an unsettled life.

As I have sought to show, this was the historical situation. I believe the difficulty remains into the present. If, in the next years, we were able to establish different political and administrative ways of communicating with Aboriginal groups, I think we would go far towards solving some of our present problems.

Appendix I

Contributors

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1. Addresses

The Hon. Peter CONNOLLY, CBE, was educated at St. Joseph's College, Brisbane and St. John's College at the University of Queensland. After having served in the A.I.F. during 1939-46, he was admitted to the Queensland Bar in 1949 and was a Member of the Legislative Assembly for Kurilpa in 1957-60. He became a Queen's Counsel in 1963, President of the Australian Bar Association in 1967-68 and President of the Law Council of Australia in 1968-70. From 1977 to 1990 he served as a Judge of the Queensland Supreme Court and now chairs the Queensland Litigation Reform Commission.

The Rt. Hon. Sir Harry GIBBS, GCMG, AC, KBE, was educated at Ipswich Grammar School and Emmanuel College at the University of Queensland, and was admitted to the Queensland Bar in 1939. After serving in the A.M.F. (1939-42), and the A.I.F. (1942-45), he became a Queen's Counsel in 1957, and was appointed, successively, a Judge of the Queensland Supreme Court (1961-67), a Judge of the Federal Court of Bankruptcy (1967-70), a Justice of the High Court of Australia (1970-81) and Chief Justice of the High Court (1981-87). Since 1987 he has been Chairman of the Review into Commonwealth Criminal Law and, since 1990, Chairman of the Australian Tax Research Foundation. In 1992 he became the founding President of The Samuel Griffith Society.

Sir David SMITH, KCVO, AO, was educated at Scotch College, Melbourne and at the Melbourne University and the Australian National University. After entering the Commonwealth Public Service in 1954, he became in 1973 Official Secretary to the then Governor-General of Australia (Sir Paul Hasluck). After having served five successive Governors-General in that capacity, he retired in 1990, being personally knighted by The Queen. He lives in Canberra, where he is now very active in both scouting and in musical activities.

2. Conference Contributors

Dr David CHESSELL was educated at Wesley College and the University of Melbourne and joined the Commonwealth Treasury in 1970. During his 17 years in the Treasury he worked mainly in the economic forecasting area and in the field of Commonwealth-State financial relations, and also gained his Ph.D. from Yale University. In 1986 he left the Treasury and, after two years working with consultants A.C.I.L. Australia, he was a joint founder (with Geoff Carmody) of the leading Canberra economic consultancy firm Access Economics.

Professor Mark COORAY was born in Ceylon (now Sri Lanka) and was educated at school there, at the University of Ceylon and at Cambridge University, where he gained his Ph.D. in 1968. After teaching law in Colombo for some years, and becoming a founding member and activist in the Civil Rights Movement there, he became in 1974 a refugee from the Bandaranaike regime. After teaching law at the University of Singapore for two years, he came to Australia in 1976 and has taught at Macquarie University since that time. He has published eleven books, more than 60 articles in academic journals, and numerous newspaper articles.

Dr Greg CRAVEN was educated at St Kevin's College, Toorak and the University of Melbourne. He has taught at Monash University, and was Director of Research for the Legal and Constitutional Committee of the Victorian Parliament (1985-87). He now holds the post of Associate Professor and Reader in law at the University of Melbourne. He specialises in constitutional law, and has written and edited a number of books in that area. He is a regular columnist for Melbourne's `Herald-Sun'.

Frank DEVINE was born in New Zealand and has been involved in journalism since joining, as a Cadet, the Marlborough Express in 1949. He came to Australia in 1954 and worked on The West Australian before becoming, in 1959, foreign correspondent for the Melbourne Herald group in, successively, New York, London and Tokyo. He then edited, in turn, the Weekend News Perth, the Reader's Digest (Australia), the Chicago Sun-Times, the New York Post and The Australian, and is now an Op-Ed Columnist with that newspaper.

Professor Alan FROST was educated at Salisbury High School, Brisbane, at the University of Queensland and at the University of Rochester, where he took his Ph.D. (in English Literature) in 1969. After lecturing in English at La Trobe University for a few years, he moved into the field of History, and in 1992 became Professor of History at La Trobe. He has published eight books and monographs and numerous articles in learned journals. In 1988 he was elected a Fellow of the Royal Historical Society, London; and in 1990, a Fellow of the Australian Academy of the Humanities.

Dr Colin HOWARD was educated at Prince Henry's Grammar School, Worcestershire, and at the University of London and Melbourne University. He taught in the Law Faculties at the University of Queensland (1958-60) and Adelaide University (1960-64) before becoming Hearn Professor of Law at Melbourne University for 25 years (1965-90). He was awarded his Ph.D. from Adelaide University in 1962 and his Doctorate of Laws from Melbourne University in 1972. He is now a practising member of the Victorian Bar, being perhaps best known for his constitutional expertise, but specializing also in commercial and administrative law, and has published a number of texts for both lawyers and laymen. During 1973-76 he was General Counsel to the Commonwealth Attorney-General; he is also a long-established commentator on public affairs.

S.E.K. HULME, AM, QC, was educated at Wesley College, Melbourne and at the Universities of Melbourne (Queen's College) and Oxford (Magdalen College). He was a Rhodes Scholar for Victoria in 1952 and the Eldon Scholar, Oxford in 1955. He was admitted to the Victorian Bar in 1953 and at Gray's Inn, London in 1957. Since 1957 he has practised as a barrister-at-law, becoming Queen's Counsel in 1968. He has published in various legal journals, and is a Director of several public companies.

Bruce KNOX was educated at C.E.G.S., Brisbane, and at the Universities of Queensland and Oxford (Magdalen College), where he was awarded the Beit Prize in 1961. After holding a number of academic teaching and research positions in Australia and overseas, he is currently a Senior Lecturer in History at Monash University. In 1988 he was elected a Fellow of the Royal Historical Society (London).

Hugh MORGAN, AO. was educated at Geelong Grammar School and the University of Melbourne. After a period as a Judge's Associate with the Commonwealth Industrial Court

(1958-62), and as a solicitor with Arthur Robinson & Co (1963-64), he joined North Broken Hill Ltd. (1965-76). He was appointed Executive Director of Western Mining Corporation Ltd. in 1976 and Managing Director in 1986. He has served on the Board of the Reserve Bank of Australia (1981-84), as a Trustee of the National Gallery of Victoria (1975- 83), and as Chairman of the Ian Clunies Ross Memorial Foundation since 1985. During 1983-86 he was Chairman of Trustees of the then newly-established Centre for Independent Studies, and has been a Councillor since 1981 (Treasurer 1981-84) of the Institute of Public Affairs. He is a prolific public speaker and contributor to the public debate more generally.

John PAUL was educated at Geelong Grammar School and the University of Melbourne (Trinity College). After ten years in the Commonwealth Public Service (1961-71), including five years in The Treasury, he moved to academia and is now Senior Lecturer in Political Science at the University of New South Wales. He has written extensively on the reserve powers of the Governor-General and the role of the Monarchy within the Australian Constitution.

John STONE was educated at Perth Modern School, the University of Western Australia and then, as a Rhodes Scholar, at New College, Oxford. He joined the Australian Treasury in 1954, and over a Treasury career of 30 years served in a number of posts at home and abroad, including as Australia's Executive Director in both the I.M.F. and the World Bank in Washington, D.C. In 1979 he became Secretary to the Treasury, resigning from that post – and from the Commonwealth Public Service – in 1984. Since that time he has been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate, Shadow Minister for Finance and, generally, a contributor to the public affairs debate. He is currently a Senior Fellow at the Institute of Public Affairs.

Appendix II

Invitation letter of 5 May, 1992

70 Gipps Street
East Melbourne, Vic. 3002
5 May, 1992

Dear

You will have noticed the emergence over the past year or so of a view among the chattering classes that Australia's Constitution is "badly in need of reform". It is said that, as we approach the Centenary of the foundation of our Federation, Australians should embark upon a large-scale process of Constitutional reconsideration and review.

We would probably all agree that, as to detail, Australians generally are deplorably ignorant of their Constitution. From that viewpoint, a broadening of public understanding of it could only be welcomed. However, before we too quickly embrace the cause of those sponsoring this process, it may be as well to ask whether that, in itself innocent motive is all that is involved.

In considering that question we might cast our minds back to a decade or so ago, when the Australian Bicentennial Authority was initially established with seemingly good intentions to prepare the not dissimilar celebration of Australia's bicentenary in 1988. That body initially set out - before the Government was forced to intervene to reshape it - to make 1988 a year of national shame, when Australians were to be enjoined to acknowledge the guilt of 200 years of European settlement, and expiate our sins rather than celebrate our achievements as a nation.

Some will recall also the establishment in 1985 by the then Attorney-General, Mr Lionel Bowen, of the Constitutional Commission, a body clearly intended to pave the way for a major process of constitutional change directed, in particular, to centralising power in Canberra even further.

The work of that body was, happily, aborted by Mr Bowen himself when in 1988 he set in train four national referenda on specific topics arising from its then almost concluded report. The overwhelming defeat of those referenda in every case, and in every State of the Commonwealth, put an end (temporarily) to those endeavours; but I believe that we would be wrong, as well as over-complacent, if we were to assume that the same forces then backing those 1985-1988 developments have abandoned their objectives.

In any case, if the reform of the Constitution is to be undertaken, it is desirable that the widest range of thought and opinion should be canvassed before any conclusions are reached. It is important that those who, while recognising that some amendments would be desirable, do not favour an approach mainly to expand Commonwealth power, should have an opportunity to make their voices heard.

Against that background, I let you know of the formation of The Samuel Griffith Society, whose charter is briefly set out in an attachment to this letter. The Society's objectives in defence of our existing Constitution will, I think, be evident from that charter, and I shall therefore not repeat them here.

In the light of events since its formation, however, I should perhaps note that the Society was formed before the recent rash of public agitation by the so-called Republican "movement", and the not unassociated controversy about our national flag. Although therefore the Society was not,

by definition, formed to combat either of those developments (the second of which is not, strictly speaking, a Constitutional issue in any case), I have little doubt that the first of them, at least, may come to figure in its deliberations. That, however, is for the future, and I say no more about it here.

The Samuel Griffith Society has been incorporated, on and from 2 January, 1992 as an incorporated association under the Victorian Associations Incorporation Act 1981. The previous Chief Justice of Australia, Sir Harry Gibbs, has agreed to serve as the Society's President, and Sir Bruce Watson, until recently Chairman of M.I.M. Holdings and a highly respected member of Australia's business community, has accepted the position of Vice-President. The other members of the Board of the Society are:

Treasurer: Mr Ray Evans
Secretary: Dr Nancy Stone
Members: Mr Hugh Morgan
Mr John Stone.

Pursuant to the foregoing, the specific purpose of this letter is to inform you that the Society proposes to hold its inaugural Conference in Melbourne on the weekend of 25-26 July, 1992 commencing with a dinner, including a Launching Address, on the evening of Friday 24 July. The venue has yet to be determined, and will obviously depend upon the degree of response to this letter, which I am addressing to a number of people who, like yourself, I judge may perhaps be interested.

Accordingly, I draw your attention to the two other enclosures with this letter. The first is a form of Application for Membership of the Society which I recommend for your consideration. Should you wish to become a member, please complete the upper portion of the form and return it to the Secretary of the Society at this address.

On your acceptance as a member, an entrance fee of $20.00 and an annual subscription of $50.00, covering the year 1992-93, will become payable and you will be billed accordingly.

Secondly, I refer to the form relating to our proposed Inaugural Conference. In order that we may settle upon a venue of appropriate size and facilities, we need to know by (say) end-May at the latest, the approximate number of those who will be attending. I hope very much that you may be among them. Would you please therefore give this particular question your urgent attention, and return this form as soon as possible, indicating (one way or the other) your response on that point.

Meanwhile, my personal good wishes, on behalf of the Society.

Yours sincerely,

(JOHN STONE)

Conference Convenor

Appendix III

The Samuel Griffith Society

The purposes of The Samuel Griffith Society are as follows:

1) To found a Society named after Sir Samuel Walker Griffith, First Chief Justice of the High Court of Australia. As Premier of Queensland and subsequently Chief Justice of the Queensland Supreme Court, Griffith was one of the prime movers of Federation. During his term as Chief Justice of the High Court from 1903 until his debilitating illness in 1917, he consistently supported the rights of States against the powers of the Federal Government.

2) To set out as a preamble to the specific purpose of the Society a statement of the role of constitutions and parliamentary and legal institutions in the following terms:

One important function of political constitutions, and indeed of all political institutions, should be that of maintaining civil peace and concord, and of protecting the citizen from the arbitrary abuse of power, including executive power.

People who have experienced nothing but peaceful association within the society in which they have grown up, take the incalculable benefits of such civil quietness for granted. The terrors of civil war or threats of civil war, of savage government repression, seem to most native born Australians to be beyond comprehension, and certainly beyond the realms of possibility here.

Nevertheless civil unrest - ethnic, political and religious violence - has been endemic throughout recorded history. Arbitrary arrest and imprisonment has, likewise, been commonplace.

Those countries which have achieved long periods of unbroken civil peace, with societies which have lived under the rule of law, have also become prosperous. Some of these countries have written constitutions. Others, such as the United Kingdom, do not.

Australia has an unbroken record of constitutional government, and rule of law. It was one of the first nations to establish universal suffrage. It has been entirely free from any hint of civil war. Up until the Great War of 1914-18 Australia was also in per capita terms, the richest country in the world.

The strength of our parliamentary and legal institutions, of our political conventions and modes of behaviour is, arguably, Australia's greatest asset. The Constitution which Australians drafted and accepted in the 1890's, and which established the framework of the Australian nation as a sovereign federal state, is the keystone of this structure and has served us well. It has protected our democracy, and our liberties, by providing for independent centres of political authority and the diffusion of power which flows from that. The Australian people have voted many times against proposed amendments. We must presume that they regard the Constitution, on the whole, with approval.

All institutions, nevertheless, require refurbishment and repair. There is growing concern at the decline in the prestige, standing and influence of parliament, and the growing centralisation of power and authority in the executive. There is also concern at the expansion of the power of the Commonwealth at the expense of the States, the increasing centralisation of power in Canberra, and the consequent growth of a Commonwealth bureaucracy which, in many areas, deals with matters which were originally the sole concern of the States.

As we approach the centenary of the passage of the Commonwealth of Australia Act (1900), by the British Parliament, a vigorous debate is building up, focussed on changes which people wish

to see made to the Constitution, to the place of the monarchy in that Constitution, and to our parliamentary institutions.
The founders of The Samuel Griffith Society wish to encourage and promote the widest possible debate not only on particular constitutional issues but on the health of our political and legal institutions generally. We intend to emphasise federalist views and to reverse the Canberra-led erosion of our federal institutions.

3) In the light of the foregoing, the Society proposes the following objectives:

General

. to promote discussion of constitutional matters through the articulation of a clear position in support of decentralisation of power through the renewal of our federal structure;
. to defend the great virtues of the present Constitution against those who would undermine it in order to supplant it with a unitary state;
. to restore the authority of parliament and defend the independence of the judiciary;
. to foster and support reform of Australia's constitutional system to these ends.

Specific

. to arrange conferences, hold meetings, publish papers, and inform people and governments in accordance with the general objectives set out above;
. to thereby encourage a wider understanding of Australia's Constitution and the nation's achievements under the Constitution.

Priority Areas

The following areas of priority have been identified in the wider debate over Australia's constitutional future:
. the need to redress the federal balance in favour of the States, in view of the excessive expansion of Commonwealth power and the need to decentralise decision making;
. the need to safeguard judicial independence in light of increasing executive encroachments;
. the need to re-assert the role of Parliament (including that of the Speaker and President of the Senate) vis a vis the Executive;
. the need to review the financial arrangements between the Commonwealth and the States with a view to achieving a more equitable and efficient division of taxation power and a greater sense of financial responsibility on the part of all Governments;
. the need to redress the duplication of bureaucracy by clearly defining the respective spheres of Commonwealth and State interest and by eliminating Commonwealth influences in matters that should be the concern of the States;
. the need to consider, and as appropriate, develop alternative methods of constitutional amendment, such as State's initiatives.

Immediate Aims

To arrange and conduct, as soon as possible, a general conference for constitutional reform.
To attract for the Society a stable membership and funding basis.